IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**MOTION TO DISMISS**
v.	)	**FOR UNLAWFUL**
	)	**PRETRIAL PUNISHMENT**
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 27 July 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 907(a) requests this Court to dismiss all charges with prejudice owing to the illegal pretrial punishment PFC Manning was subjected to in violation of Article 13, UCMJ and the Fifth and Eighth Amendments to the United States Constitution. Alternatively, the Defense requests that this Court grant meaningful relief to include at least 10-for-1 sentencing credit.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden to present evidence to support PFC Manning's claim of illegal pretrial punishment. This involves a "relatively low burden of proof." *United States v. Scalarone*, 52 M.J. 539, 544 (N-M. Ct. Crim. App. 1999). Once the Defense does this, the burden then shifts to the Government to present evidence to rebut the allegation beyond the point of inconclusiveness. *See United States v. Cordova,* 42 C.M.R. 466, 1970 WL 7132 (A.C.M.R. 1970)("Appellate government counsel apparently contend that because the evidence is 'inconclusive' the fact of pretrial punishment has not been established. If this be the Government's intended conclusion, we do not agree. The burden of producing evidence in support of a motion to dismiss on the basis of illicit punishment while an accused is confined pending trial, is one for the defense. However, once the issue is raised—in this case by the aforementioned testimony—the burden shifts to the prosecution to rebut that evidence beyond the point of equipoise or 'inconclusiveness.'"); *United States v. Scalarone*, 52 M.J. 539, 543-4 (N-M. Ct. Crim. App. 1999).

AMICUS FILINGS

3. The Defense requests that this Court consider an *amicus* filing from Psychologists for Social Responsibility. This has been filed as Attachment 41.

WITNESSES/EVIDENCE

4. The Defense requests the following witnesses be produced for this motion:

a) Col. Robert Oltman;
b) Capt. William Hocter;
c) COL Ricky Malone;
d) Capt. Brian Moore;
e) LCDR David Moulton;
f) LTC Dawn Hilton;
g) Mr. Juan Méndez;
h) PFC Bradley Manning.

This Court has ruled that the testimony of Mr. Juan Méndez is not relevant and necessary for this motion.

5. The Defense requests the following evidence be produced for this motion:

a) Suicide Smock;
b) Suicide Blanket;
c) Suicide Mattress.

ATTACHMENTS

6. The Defense respectfully requests that this Court consider the following Attachments:

1. Initial Custody Classification Determination
2. Psychiatrists' Weekly Recommendations
3. Secretary of Navy Instruction (SECNAVINST)1640.9C
4. Special Handling Instructions
5. Observation & Evaluation (O&E) Notes
6. Classification & Assignment (C&A) Board Reviews
7. Capt. Hocter Affidavit #1
8. Capt. Hocter Affidavit #2
9. COL Malone Affidavit
10. Memorandum to CWO4 Averhart About Conditions of Confinement, 5 January 2011
11. Request for Release From Confinement, 13 January 2011
12. COL Carl R. Coffman Jr., Response to Request for Relief From Confinement, 21 January 2011
13. PFC Manning Article 138 Complaint, 19 January 2011
14. PFC Manning Rebuttal to Col. Choike's Response to Article 138 Complaint, 10 March 2011 [hereinafter "Rebuttal to Article 138 Complaint"]
15. CWO4 James Averhart Response to Article 138 Complaint, 24 January 2011

16. CWO4 Averhart Response PFC Manning Rebuttal to Article 138 Complaint, 16 March 2011
17. Col Oltman Response to Article 138 Complaint, 31 January 2011
18. Col. Choike Response to Article 138 Complaint, 1 March 2011
19. Col. Choike Notification of Separate Filing for New Matters Raised, 6 April 2011; Col. Choike Response to PFC Manning Rebuttal to Article 138 Complaint, 8 April 2011; PFC Manning Rebuttal #2 and Request to Consider New Matter Raised, April 10
20. CWO2 Denise Barnes Response to Article 138 Complaint, 7 April 2011
21. CWO2 Barnes Response to PFC Manning Rebuttal to Article 138 Complaint, 10 May 2011
22. CWO5 Abel Galaviz Investigation in Response to Article 138 Complaint and Appointment Memorandum
23. Juan Garcia Final Action on Article 138 Complaint, 13 June 2011
24. Affidavits of Brig Guards Regarding Incident on 18 January 2011
25. Video Recording of Incident at Quantico Brig on 18 January 2011
26. Photo of Suicide Prevention Smock
27. Affidavit of Brig Guard Documenting Incident Where PFC Manning was Trapped in the Suicide Smock
28. Amnesty International Letter
29. Law Professors' Letter
30. Psychologists for Social Responsibility Letter
31. European Leaders' Letter
32. Materials Related to the United Nations Special Rapporteur on Torture, Mr. Juan Méndez
33. Emails between Mr. Coombs and CPT Fein related to: a) PFC Manning's POI status at Quantico; and b) arranging a unmonitored official visit
34. Quantico Brig Policy on Visitation
35. CWO4 Averhart Memorandum to the Office of the Regimental Judge Advocate, 1 December 2010
36. PFC Manning DD510 Grievance Re: Conditions of Confinement
37. Statement from Professor Haney on Solitary Confinement and Other Documentation From the United States Senate Committee on the Judiciary
38. Work Reports
39. Incident Reports
40. 5-minute Observation Notes (sample)
41. Amicus Filing from Psychologists for Social Responsibility

FACTS

7. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two

specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010). PFC Manning has been held in pretrial confinement since 29 May 2010, a total of 791 days. For 265 of these days, PFC Manning was held in conditions tantamount to solitary confinement at the Quantico Brig.

A. PFC Manning's Confinement in Kuwait and Transfer to Quantico

8. On 27 May 2010, PFC Manning was detained by agents from the Army's Criminal Investigation Division (CID). He was subsequently placed into pretrial confinement on 29 May 2010. PFC Manning was held in a secured area on Forward Operating Base Hammer, Iraq until he could be transported to the Theater Field Confinement Facility (TFCF) at Camp Arifjan, Kuwait. PFC Manning was transported to the TFCF on 31 May 2010.

9. During his time in Kuwait, PFC Manning's mental health deteriorated. PFC Manning was anxious, confused and disoriented for much of his time in Kuwait. Although he was seen by mental health providers in Kuwait, given the limited resources at the TFCF, the Government decided to transport PFC Manning to a facility with adequate specialized resources to manage PFC Manning's care.

10. PFC Manning was transported from the TFCF to the Marine Corps Base Quantico (MCBQ) Pretrial Confinement Facility (PCF) on 29 July 2010. The Duty Brig Supervisor (DBS) reviewed the inmate background summary and completed an initial custody classification determination (DD Form 2711). *See* Attachment 1. The DBS determined that PFC Manning's score was a "5," significantly lower than the "12 + Points" normally required for a MAX custody determination. Despite the low score, the DBS chose to override the custody determination and assign PFC Manning to MAX custody. The DBS cited PFC Manning's previous suicide watch while in Kuwait as the rationale for this decision. *Id.* The PCF Commander, CWO4 James Averhart, approved of the MAX custody determination by the DBS and also decided that PFC Manning should be placed under special handling instructions of Suicide Risk (SR).

11. On 30 July 2010, Navy Captain (Capt.) William Hocter, the forensic psychiatrist for the Brig, conducted his first assessment of PFC Manning. Capt. Hocter has over 20 years of experience as a forensic psychiatrist. At the time of his assessment, he was the Senior Medical Officer for the Behavioral Health Clinic at Quantico with the responsibility for providing psychiatric care to all active duty personnel stationed at Quantico. One of his collateral duties was to provide onsite mental health care to the Brig detainees. Capt. Hocter initially recommended observing PFC Manning on Suicide Risk precautions because of his suicide watch in Kuwait. Within days of arriving at the Brig, PFC Manning began to respond favorably to treatment. On 6 August 2010, Capt. Hocter determined that PFC Manning was no longer considered a suicide risk. He recommended that PFC Manning be moved from Suicide Risk to Prevention of Injury (POI) status. *See* Attachment 2. Knowing that the Brig was very concerned about PFC Manning's safety, and because there had been a suicide in the Brig earlier that year, Capt. Hocter elected to obtain the services of another senior forensic psychiatrist, COL Rick

Malone, as a consultant/second opinion. COL Malone evaluated PFC Manning and he concurred that PFC Manning should be downgraded from Suicide Risk to POI. Despite these recommendations and contrary to the requirements of Secretary of Navy Instruction (SECNAVINST) 1640.9C, the Brig did not immediately remove PFC Manning from Suicide Risk. *See* Attachment 3, Section 4205.5.d. ("When prisoners are no longer considered to be suicide risks by a medical officer, they shall be returned to appropriate quarters."). Instead, it was not until almost a week later, on 11 August 2010, that CWO4 Averhart directed PFC Manning be moved from Suicide Risk to POI. *See* Attachment 5.

12. Over the course of the following three weeks, PFC Manning was observed by the Brig staff and received regular treatment from the Brig psychiatrists. During this time, the Brig staff noted in PFC Manning's Observation and Evaluation (O&E) notes that he was adjusting well to confinement. *See generally* Attachment 5. The Brig staff noted that PFC Manning "has presented no problems and has been courteous and respectful to staff." The Brig staff also noted that PFC Manning's conduct "has been excellent" and that PFC Manning states he "does not have any suicidal feelings" and "has not been suicidal since arriving at Quantico and mentally feels good." *Id.* Given his exemplary behavior, the Brig staff informed PFC Manning of the process of reducing his custody and classification and of the possible job assignments that PFC Manning could receive while in confinement. PFC Manning indicated that he would like a job in the Brig library.

13. On 27 August 2010, Capt. Hocter determined that PFC Manning was no longer considered a risk of self-harm and recommended that PFC Manning be taken off of POI status. *See* Attachment 2. The PCF Commander did not follow Capt. Hocter's recommendation.

B. PFC Manning is Held in MAX Custody and Under Prevention of Injury Status for the Next Eight Months

14. Under SECNAVINST 1640.9C, the regulation that details the proper procedures and safeguards for classification of inmates, evaluation of inmates, and the limited use of special quarters, a Maximum Custody detainee is subject to following mandatory restrictions:

1) Supervision must be immediate and continuous. A DD 509, Inspection Record of Prisoner in Segregation, shall be posted by the cell door and appropriate entries made at least every 15 minutes.
2) They shall not be assigned to work details outside the cell.
3) They shall be assigned to the most secure quarters.
4) Two or more staff members shall be present when MAX prisoners are out of their cells.
5) MAX prisoners shall wear restraints at all times when outside the maximum-security area and be escorted by at least two escorts (confinement facility staff or certified escorts, per article 7406).

6) On a case-by-case basis, the CO/OIC/CPOIC may authorize additional restraint for movement of specific MAX prisoners. A military judge may direct that restraints be removed from a person in the courtroom if, in this judge's opinion, such restraint is not necessary. In all cases, the limitations of article 1102 of reference (b) shall be observed.

See Attachment 3. CWO4 Averhart adds the following characteristics of MAX custody:

7) Inmates must be under observation of a supervisor of the same sex.

8) Such prisoners shall be berthed in special quarters and physically checked every 5 minutes.

See Attachment 15.

15. By contrast, a Medium Custody detainee is subject to the following restrictions:

1) Supervision shall be continuous within the security perimeter and immediate and continuous when outside the security perimeter.

2) They shall not be assigned to work outside the security perimeter.

3) They shall wear restraints outside the security perimeter unless the CO/OIC/CPOIC directs otherwise.

4) They shall be escorted by at least two confinement facility staff or certified escorts, per article 7406, unless the CO/OIC/CPOIC directs only one escort is required.

5) They may be assigned dormitory quarters.

See Attachment 3.

16. PFC Manning was classified as a MAX detainee for the entirety of his time at Quantico. In addition to his MAX custody classification, PFC Manning was also held under POI status, which necessitated the use of special quarters. "Special Quarters" are described under Section 4205 of SECNAVINST 1640.9C as follows:

a. Some prisoners require additional supervision and attention due to personality disorders, behavior abnormalities, risk of suicide or violence, or other character traits. If required to preserve order, the BRIG Os or, in their absence, the brig duty officers/duty brig supervisors may authorize special quarters for such prisoners for purposes of control, prevention of injury to themselves or others, and the orderly and safe administration of the confinement facility. A hearing to

determine the need for continued administrative segregation of the prisoner shall be conducted. This hearing may be by board action or by a member of the confinement facility appointed in writing by the BRIG O, and a written recommendation to the BRIG O will be provided within 72 hours of the prisoner's entry into segregation.

b. Special quarters is a group of cells used to house prisoners who have serious adjustment problems or certain medical issues, are highly temperamental or emotional, anti-social, some medical cases, or who cannot get along with other prisoners, or are persistent custodial problems. Special quarters are not a punitive measure and shall not be used as such. Prisoners must be made aware of the reason they are berthed in special quarters. Prisoners are assigned to special quarters by the BRIG O and shall not have normal privileges restricted unless privileges must be withheld for reasons of security or prisoner safety (e.g., suicide risks or aggressive, assaultive or predatory prisoners). For each period of 30 days a prisoner is retained in special quarters, the C&A board shall review and provide a recommendation to the BRIG O, who shall determine and certify the requirement for continuation in special quarters.

c. Disciplinary segregation is provided for in article 5105.3e.

d. Prisoners who have threatened suicide or have made a suicide gesture but are found fit for confinement may be placed within special quarters under continuous observation while in the category of suicide risk. CO/OIC/CPOIC may direct removal of prisoner's clothing when deemed necessary. Prisoner must be under observation of a supervisor of the same sex. Closed circuit television may be installed at a limited number of cells for observation, although cross gender monitoring is not authorized.

2. Procedures. All prisoners in special quarters shall be under continual supervision. Special precautions shall be taken in equipping, inspecting, and supervising their quarters to prevent escapes, self-injury, and other serious incidents. They shall be sighted at least once every 15 minutes by a staff member and shall be visited daily by a member of the medical department and the BRIG O. In addition, it is highly desirable that prisoners in special quarters be visited daily by a chaplain. Each sighting of and visit to any segregated prisoner shall be officially recorded and include date, time, name of visitor, and any appropriate remarks. DD 509, Inspection Record of Prisoner in Segregation, shall be used to record visits.

See Attachment 3. POI status is assigned to those prisoners who have given an indication that they intend or are contemplating harming themselves. *See* Attachment 15.

17. The combination of PFC Manning's MAX and POI status meant that for approximately 9 months while at Quantico, PFC Manning was held in his 6x8 cell for 23-24 hours a day. His cell did not have a window or any natural light.

18. Owing to his classification as a MAX detainee, PFC Manning was subject to the following restrictions:

a) PFC Manning was placed in a cell directly in front of the guard post to facilitate his constant monitoring.

b) PFC Manning was awoken at 0500 hours and required to remain awake in his cell from 0500 to 2200 hours.

c) PFC Manning was not permitted to lie down on his rack during the duty day. Nor was PFC Manning permitted to lean his back against the cell wall; he had to sit upright on his rack without any back support.

d) Whenever PFC Manning was moved outside his cell, the entire facility was locked down. CWO4 Averhart describes this as follows, "While a maximum custody inmate is outside of a secured area, the facility will commence a lockdown until the inmate is returned to a secure area. No other inmates are allowed to move throughout the facility while a maximum custody inmate is outside of a secured area. At no time will maximum custody inmates be outside of a secured area at any time." *See* Attachment 15.

e) Whenever PFC Manning was moved outside his cell, he was shackled with metal hand and leg restraints and accompanied by at least two guards.

f) From 29 July 2010 to 10 December 2010, PFC Manning was permitted only 20 minutes of "sunshine call." Aside from a 3-5 minute shower, this would be the only time PFC Manning would regularly spend outside his cell. During this sunshine call, he would be brought to a small concrete yard, about half to a third of the size of a basketball court. PFC Manning would be permitted to walk around the yard in hand and leg shackles, while being accompanied by a Brig guard at his immediate side (the guard would have his hand on PFC Manning's back). Two to three other guards would also be present observing PFC Manning. PFC Manning would usually walk in figure-eights or some other pattern. He was not permitted to sit down or stay stationary.

g) Initially, Brig guards provided PFC Manning with athletic shoes *without* laces which would fall off when he attempted to walk. PFC Manning elected to wear boots instead because at least the boots would stay on when he walked.

h) From 10 December 2010 onward, PFC Manning was permitted a one hour recreation call. At this point, the Brig authorized the removal of his hand and leg shackles and PFC Manning was no longer required to be accompanied by a Brig guard at his immediate

side. CWO4 Averhart describes PFC Manning's recreation privileges as follows: "Because the outdoor recreation area is not a secured area, restraints are not normally removed from maximum custody inmates. All inmates, unless in a SR, POI or disciplinary status are allowed to exercise while in their cells provided that it does not disrupt the good order and discipline of the facility. Due to the extended period of time that PFC Manning has been in a SR or POI status, and not allowed to exercise within his cell, I authorized PFC Manning's restraints to be removed while conducting recreation call inside although he is not in a secured area." *See* Attachment 15. Although PFC Manning was technically "permitted" to use exercise equipment at the gym, most of this equipment was unplugged or broken down. In addition, depending on the guards, they would not permit him to use certain types of equipment (e.g. the chin up bar). So as to avoid any problems with the guards, PFC Manning would usually walk around the room as he had during his sunshine calls. Three or four guards would be monitoring PFC Manning during his recreation call.

i) PFC Manning was only authorized non-contact visits. The non-contact visits were permitted on Saturdays and Sundays between 1200 and 1500 hours by approved visitors. During these visits, he would have to wear his hand and leg restraints.

j) PFC Manning was required to meet his visitors in a small 4 by 6 foot room that was separated with a glass partition. His visits were monitored by the guards and they were audio recorded by the Brig. The recording equipment was added by Army CID after PFC Manning's transfer to the Quantico Brig.

k) PFC Manning was only permitted non-contact visits with his attorneys. During these visits, he was shackled at the hands and feet.

l) PFC Manning was not permitted any work duty. However, "special quarters work and training reports" were routinely filled out pertaining to PFC Manning (presumably reports generated from observing PFC Manning cleaning his cell). *See* Attachment 38.

19. Owing to PFC Manning being placed on continuous POI status, he was subject to the following further restrictions:

a) PFC Manning was subject to constant monitoring; the Brig guards were required to check on him every five minutes by asking him some variation of, "are you okay?" PFC Manning was required to respond in some affirmative manner. Guards were required to make notations every five minutes in a logbook. *See* Attachment 40.

b) At night, if the guards could not see him clearly, because he had a blanket over his head or he was curled up towards the wall, they would wake PFC Manning in order to ensure that he was okay.[1]

c) At night, only some of the lights would be turned off. Additionally, there was a florescent light in the hall outside PFC Manning's cell that would stay on at night.

d) PFC Manning was required to receive each of his meals alone in his cell. He was only permitted to eat with a spoon.

e) There were usually no detainees on either side of PFC Manning. If PFC Manning attempted to speak to those detainees that were several cells away from him, the guards would order him to stop speaking.

f) PFC Manning originally was provided with a standard mattress and no pillow. PFC Manning tried to fold the mattress to make a pillow so that he could be more comfortable when sleeping. Brig officials did not like this, so on 15 December 2010 they provided him with a suicide mattress with a built-in pillow. This built-in pillow was only a couple of inches high and was not really any better than sleeping on a flat mattress.

g) PFC Manning was not permitted regular sheets or blankets. Instead he was provided with a tear-proof security blanket. This blanket was extremely coarse and irritated PFC Manning's skin. At first, PFC Manning would get rashes and carpet burns on his skin from the blanket. Eventually, his skin became accustomed to the coarseness of the blanket and he got fewer rashes. The blanket did not keep PFC Manning warm because it did not retain heat and, due to its stiffness, did not contour to his body.

h) PFC Manning was not allowed to have any personal items in his cell.

i) PFC Manning was only allowed to have one book or one magazine[2] at any given time to read. If he was not actively reading, the book or magazine would be taken away from him. Also, the book or magazine would be taken away from him at the end of the day before he went to sleep.

j) For the last month of his confinement at Quantico, PFC Manning was given a pen and five pieces of paper along with his book. However, if he was not actively reading his book and taking notes, these items would be taken away from him.

k) PFC Manning was prevented from exercising in his cell. If he attempted to do push-ups, sit-ups, or any other form of exercise he would be forced to stop.

---

[1] CWO4 Averhart writes, "inmates are not authorized to cover their entire face with blankets while sleeping. Inmates are not to be awakened for the purpose of bed checks, however positive identification must be made if no part of an inmate is visible. The only way for this to be possible is to ... awaken the inmate ..." *See* Attachment 15.
[2] He was also "permitted" one copy of the Brig's rules and regulations. *See* Attachment 15.

l) When PFC Manning went to sleep, he was required to strip down to his underwear and surrender his clothing to the guards.

m) PFC Manning was only permitted hygiene items as needed. PFC Manning would have to request toilet paper every time he wanted to go to the bathroom; at times, he had to wait for guards to provide him with toilet paper.

n) There was no soap in his cell. PFC Manning requested soap to wash his hands after using the bathroom; guards would sometimes get the soap, and sometimes not.

o) PFC Manning was not permitted to wear shoes in his cell.

p) PFC Manning was initially only permitted correspondence time for one hour a day; after 27 October 2010, this was changed to two hours per day.

See Attachment 4.

C. Multiple Psychiatrists Recommended for Eight Months that PFC Manning Be Downgraded from POI Status

20. Over the course of eight months, with only two exceptions, Capt. Hocter and COL Malone consistently recommended that PFC Manning be removed from POI status. *See* Attachment 2.

21. Capt. Hocter states in his affidavit that the Brig did not follow his repeated recommendations to downgrade PFC Manning from POI. In his first affidavit, dated 7 April 2011, Capt. Hocter states as follows:

> I, William J. Hocter, Jr., the undersigned, do hereby certify and swear that the following is true: I am an active duty member of the United States Navy. I have over 19 years of experience as a forensic psychiatrist. My current position is OIC, Combat Stress Clinic, Camp Leatherneck, Helmand Province, Afghanistan. My usual job is as Senior Medical Officer for the Behavioral Health Clinic at MCB Quantico. One of my collateral duties is to provide onsite medical health care to all active duty personnel on the base. In my duty position, I am responsible for providing psychiatric care to all active duty personnel on the base. I also provide limited forensic services as time permits.
>
> **Question A. Do you make recommendations to the Quantico Brig concerning whether a detainee is placed on either Suicide Risk or Prevention of Injury Status?**
>
> 1. Yes.

Question B. In your experience, does the Quantico Brig follow your recommendation concerning either Suicide Risk or Prevention of Injury Status?

1. No. They generally keep patients on precautions longer than I recommend.

Question C. Have you made any recommendation concerning PFC Bradley Manning's custody and classification status? If so, what were your recommendations?

1. Yes. Please note that this is from recollection as I do not have access to my notes. I am currently at Camp Leatherneck in Afghanistan. I initially recommended observing PFC Manning on suicide precautions for the first couple of weeks after his arrival, both because of his suicidal behavior in Kuwait and because his medical record from Kuwait included a quote or a paraphrase from PFC Manning to the effect that he could be patient when it comes to suicide.

2. After a couple of weeks, it seemed reasonable to downgrade his precaution level to Prevention of Injury (POI) status. Knowing that the Brig was very concerned about his safety, and because there had been a suicide in the Brig earlier that year, I obtained the services of another forensic psychiatrist (Col. Rick Malone) to be a consultant/second opinion. He evaluated the patient and concurred that POI was appropriate. The Brig, as I best recall, waited a couple of weeks to put this recommendation into effect.

3. Subsequently, I recommended that he be removed from POI as he continued to do relatively well in the Brig (occasional mild, odd behaviors such as dancing around were noted in the log as well as possible sleep walking). Col. Malone concurred. These recommendations were not followed.

4. In the fall (I am uncertain of the date); PFC Manning became agitated after an odd incident with staff. As best as I could tell from discussing the matter with Manning and with staff, he had been performing some kind of yoga move in which he contorted his limbs in such a way that staff thought he was trying to hurt himself. They intervened and returned him to his cell. He was very upset about this (not suicidal) and so I briefly recommended he be put back on POI status as a safeguard because he was so upset. I rescinded this recommendation the following week as he had calmed.

5. Since then, I have continued to recommend that POI precautions be removed. As of the time of my leaving for Camp Lejeune to prepare for deployment, the recommendations had not been followed. CAPT Moore and Col. Malone can provide details of what occurred next.

Question D. Have your recommendations been followed by the Quantico Brig? If not, have you been given any reason for the Quantico Brig's decision not to follow your recommendations?

1. No. My understanding is that the Brig has not followed my recommendations because of great concern and worry that Manning will harm himself. I told them I thought the Max status (with every 15 minute visual checks of the detainee vice POI with every 5 minute checks) was more than sufficient to ensure his safety, from a psychiatric perspective. The every 5 minute checks done for POI is extremely rigorous, particularly for a second tier precaution. Every 15 minute checks was common for suicide precautions in other jails and correctional facilities where I have worked.

2. I wish to add that I do not believe the staff has disregarded my recommendations out of malice toward Manning. The Marine Corps, including Quantico, has had a miserable time with the problem of suicide recently. I am certain, from their point of view, the best way to avoid a tragedy is to watch a situation very closely and take action quickly. It has been difficult to help them see that good intentions can have unintended consequences (e.g., making the detainee more anxious and causing occasional agitation).

Question E. With respect to PFC Bradley Manning, is being held under Maximum Custody and either Suicide Risk or Prevention of Injury Status since 31 July 2010 detrimental to his mental or physical health? Why or why not?

1. I believe that (at the time I last saw him) Suicide precautions and POI were excessive and were making Manning unnecessarily anxious. This could be detrimental to his mental health. I was concerned about his physical health until they started to give him more time to exercise. Since Max status is not a psychiatric classification, I did not make a recommendation regarding it except to say that it easily (as a secondary effect of checking on him every 15 minutes) met his psychiatric safety needs at the time.

Question F. With respect to PFC Bradley Manning, have you seen or documented any behavior to suggest that he is a risk to harm others or himself, a disruptive detainee, or otherwise noncompliant with Quantico Brig rules and procedures?

1. Not since I met him. Given the report from Kuwait, I had expected more difficulty.

Question G. Without violating any patient-client confidentiality, can you address the events of 18 January 2010 and 2 March 2011 which the Quantico

Brig has used to further restrict PFC Bradley Manning's confinement conditions?

1. If I remember correctly, there had been some kind of disagreement between Manning and the staff and I was called urgently to come over at the end of the work day in order to see Manning. I remember being a bit annoyed because I had to report to Lejeune in less than 48 hours. I came over and it appeared that the staff was gearing up (and suiting up) for a cell extraction.[3] I was able to defuse the situation, but frankly cannot remember what the disturbance was about. I remember it did not seem to be anything terribly serious, but my memory fails otherwise. CAPT Moore joined me halfway through this experience and may have a better recollection. By 2 March, I was in Afghanistan.

See Attachment 7.

---

[3] A "cell extraction" is a term used in correctional facilities to describe the process of forcible removal of an inmate from his cell. The website http://cellextractions.com/ describes what a "cell extraction" entails:

> The use of force is inherent in the very nature of involuntary confinement. In prisons, "the responsible deployment of force is not only justifiable on many occasions, but absolutely necessary to maintain the security of the institution." The need to use force in a prison may sometimes include the forcible removal of an inmate from his cell, called a "cell extraction."
>
> Cell extractions are security measures, not disciplinary mechanisms. In well-managed correctional systems, they are used only in response to an imminent and serious risk to the safety and security of an individual or of the institution. In such prisons, officers know cell extractions are rarely needed; in some prisons, however, the institutional culture permits cell extractions simply to show inmates "who's in charge" or to retaliate against defiant inmates, even if there is no real emergency.
>
> When the decision has been made that an inmate cannot be allowed to remain in his cell, properly trained staff will make every effort to avoid a forced cell extraction. Officers will talk with the inmate. Indeed, it may be necessary for corrections staff to talk to an inmate for a prolonged period and then allow the inmate a "cooling down" period to increase chances that forcible extraction will not be necessary. Counselors or mental health staff may be brought in to talk to the inmate. If verbal efforts fail, in many facilities pepper spray is used to overcome the inmate's resistance.
>
> If officials decide to go ahead with a forcible cell extraction, the increasingly prevalent practice is to use a team of four to six specially trained correctional officers. They wear protective equipment that typically includes major torso padding, Kevlar sleeves, big black gauntlets, a helmet, a face plate, and a groin guard. The team lines up in front of the cell, and the officers ask the inmate one more time whether he is willing to "cuff up"—submit to restraint and leave the cell. If the inmate continues his resistance, the team enters the cell. Often, the first member of the team to enter the cell carries a large convex Plexiglas shield or a stun shield (a shield equipped with an electric current which stuns the inmate on contact) with which he pins the inmate against the wall. The other members of the team then gain control of and place restraints on the inmate's arms and legs. In most cases, a well trained cell extraction team is able to secure the removal of even a violent prisoner with minimal or no harm to him or staff.

22. On 14 April 2010, Capt. Hocter filed a supplemental affidavit, in response to a request for clarification and amplification of certain points from Defense counsel:

Question A. Do you make recommendations to the Quantico Brig concerning whether a detainee is placed on either Suicide Risk or Prevention of Injury Status?

I make recommendation about suicide precautions, POI, and occasionally steps that Brig might take to better a detainee's condition or deportment (more time to exercise, give him a job, help him with the legal work on financial problem, let him talk to his wife or girlfriend more often, please make sure a chaplain sees him). The Brig takes these under advisement and sometimes follows them, usually not. In Manning's case, I requested, in addition to removal of precautions, more time to exercise. After quite some time, and numerous requests (it became almost comical), this was granted.

Question B. In your experience, does the Quantico Brig follow your recommendation concerning either Suicide Risk or Prevention of Injury Status?

The Brig frequently ignores or delays my recommendation regarding precautions, including suicide precautions. This differs from any of the previous jails, brigs, or prisons in which I have worked, military or civilian. This occurred even before the suicide of a detainee in January 2010. Prior to the Manning case, this, among other issues, had make working at the Brig so frustrating that I asked to be relieved of these duties. This was not permitted. I have struggled to make the best of a situation that was not professionally pleasing. The addition of forensic psychiatry fellows to the milieu (for me to teach) has been invigorating and lifted my morale.

Question C. Have you made any recommendation concerning PFC Bradley Manning's custody and classification status? If so, what were your recommendations?

Nothing further.

Question D. Have your recommendations been followed by the Quantico Brig? If not, have you been given any reason for the Quantico Brig's decision not to follow your recommendations?

Neither the Brig Commander nor the Security Battalion Commander gave me any reasons for maintaining the POI precautions other than his safety. The Security Battalion Commander intimated that he was receiving instructions from a higher authority on the matter but did not say from whom. I know that the higher base

authorities had a frequent (sometimes weekly) meeting to discuss Manning, for which I supplied my CO with a status report – nothing that Manning had told me, mind you, but his condition and my recommendations, particularly to remove conditions I felt were unnecessary. I did not attend these meetings, mainly to protect Manning's confidentiality against inadvertent slips. On one occasion, concern was relayed to me about the odd behaviors seen in the cell mentioned in my previous affidavit. I reported that I was not worried about the sleep walking and the dancing.

I do not recall a meeting with the Base Commander (Col. Choike). The meeting I recall was with the Security BN CO, whose name I do not recall. He indicated that Manning would remain in current status (POI) unless and until he received instructions from higher authority (unnamed). I do not recall him saying he would be kept that way until his legal process was complete, but the impression he left was not to expect any changes in the near future. I cannot recall a direct quote.

Question E. With respect to PFC Bradley Manning, is being held under Maximum Custody and either Suicide Risk or Prevention of Injury Status since 31 July 2010 detrimental to his mental or physical health? Why or why not?

PFC Manning, according to his records from Kuwait, exhibited a disturbing level of mental instability, including suicidal behaviors. Thankfully, he was doing much better during his time with me. Inappropriate use of POI and other precautions can result in a loss of privacy and dignity that can worsen someone's condition. This could occur in Manning's case and lead to regression and additional suicidal behaviors. Whether the precautions are inappropriate now, I leave to the current treating psychiatrist.

Question F. With respect to PFC Bradley Manning, have you seen or documented any behavior to suggest that he is a risk to harm others or himself, a disruptive detainee, or otherwise noncompliant with Quantico Brig rules and procedures?

Given the amount of scrutiny he received from the Brig, and the seriousness of his charges, I had expected him to have many more problems. I had initially suspected that we would see regression and perhaps some suicidal behaviors. He held up remarkably well. He was generally a well behaved detainee.

Question G. Without violating any patient-client confidentiality, can you address the events of 18 January 2010 and 2 March 2011 which the Quantico Brig has used to further restrict PFC Bradley Manning's confinement conditions?

> I think that Manning was beginning to chafe at the conditions of his incarceration (including POI) among other things, but I really don't remember the specifics. As you recall, I was due in Camp Lejeune in less than 2 days to begin training for deployment, still had some last minute packing to do, and needed to say good bye to my large family. In short, I had a lot on my mind. I really don't recall the specifics. I do recall having the thought, as I was sitting in the Brig talking to Manning that the whole situation could have been avoided.

See Attachment 8.

23. COL Malone also provided an affidavit to the same effect:

> I, COL Ricky Malone, the undersigned, do hereby certify and swear that the following is true:
>
> I am an active duty member of the United States Army. I have over ten years of experience as a forensic psychiatrist. My current duty position is Chief, Walter Reed Forensic Psychiatry Service, and I am the Forensic Psychiatry Consulting to the U.S. Army Surgeon General. In my duty position, I am responsible for overseeing the professional services and training activities for eight forensic psychiatrists and psychologists.
>
> **Question A. Do you make recommendations to the Quantico Brig concerning whether a detainee is placed on either Suicide Risk or Prevention of Injury Status?**
>
> 1. It is my understanding that the Brig staff is authorized to initiate a Suicide Watch, but it requests concurrence by the psychiatrist to maintain it. Prevention of Injury, however, is treated as a custodial status to be determined by the Brig and I do not make a recommendation on the ultimate issue. I conduct a behavioral risk assessment to estimate the risk of harm to self or others (low, moderate, or high), based on static risk factors, modifiable risk factors, and protective factors, and provide that input to the Brig.
>
> **Question B. In your experience, does the Quantico Brig follow your recommendation concerning either Suicide Risk or Prevention of Injury Status?**
>
> 1. They initiate more precautions than I would from a psychiatric perspective. Were he not in custody, at this point he would be appropriate for routine outpatient care.

Question C. Have you made any recommendation concerning PFC Bradley Manning's custody and classification status? If so, what were your recommendations?

1. No. I have stated that there is no psychiatric reason for him to be segregated from the general population, realizing that would only be one consideration.

Question D. Have your recommendations been followed by the Quantico Brig? If not, have you been given any reason for the Quantico Brig's decision not to follow your recommendations?

1. They have expressed concerns about his demeanor with no medical personnel are there, describing him as more withdrawn and reading less.

Question E. With respect to PFC Bradley Manning, is being held under Maximum Custody and either Suicide Risk or Prevention of Injury Status since 31 July 2010 detrimental to his mental or physical health? Why or why not?

1. It has long been known that restriction of environmental and social stimulation has a negative effect on mental functioning. Nevertheless, PFC Manning has been able to adapt somewhat and his anxiety disorder is currently in remission, significantly reducing his risk of self harm.

Question F. With respect to PFC Bradley Manning, have you seen or documented any behavior to suggest that he is a risk to harm others or himself, a disruptive detainee, or otherwise noncompliant with Quantico Brig rules and procedures?

1. When I first saw him in August 2010 I considered him to be at moderate to high risk of self harm. However, that has changed over the months and I have not had any further concerns. I have never heard of him being disruptive, but he does make provocative comments to the staff as part of his intellectualization (e.g. 2 March 2011).

Question G. Without violating any patient-client confidentiality, can you address the events of 18 January 20100 and 2 March 2011 which the Quantico Brig has used to further restrict PFC Bradley Manning's confinement conditions?

1. On 2 March 2011 PFC Manning made a comment (out of frustration when he described it to me), basically ridiculing the POI precautions because if he really wanted to kill himself he could use his flip flops or underwear waistband. The

Brig staff took this as evidence that he was at least thinking about it and removed them.

See Attachment 9.

24. Thus, as is clear, Capt. Hocter and COL Malone recommended for eight months that PFC Manning be removed from POI. Quantico officials chose time and again to ignore these recommendations.

E. PFC Manning Was a Model Detainee During his Time at Quantico

25. Although the Brig psychiatrists generally did not make any additional recommendations regarding MAX to MDI, the observation notes of PFC Manning during this time demonstrate that PFC Manning was consistently considered a model detainee. *See* Attachment 5.

a) 3 August 2010 Entry: "SND [PFC Bradley Manning] did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "SNDs conduct has been average and has presented no problems to staff or inmates. During the interview SND was respectful and courteous and was well spoken. SND stated that he was doing well and was not having suicidal or homicidal feelings."

b) 12 August 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "SND stated that he would like a job in the facility library if it became possible. To this point in confinement SND's conduct has been average and has presented no problems to staff or inmates. During the interview SND was quiet, but courteous and respectful. SND answers questions but speaks very little unless responding to a question. Currently SND appears to be trying to adjust to the daily routine and observing what is going on around him. During the interview SND was well spoken, neat in appearance and maintained eye contact. SND stated that he does not have any suicidal feelings at this time."

c) 16 August 2010 Entry: "SND was evaluated by the Brig Psychologist and found not to be a threat to himself. It is recommended that SND be removed from SR, and be placed on POI (sic) remain MAX custody."

d) 17 August 2010 Entry: "The Brig Psychiatrist found SND to be a reduced threat to himself on 6 August 2010."

e) 24 August 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluation and received an average work and training report." The entry also notes "[t]o this point in confinement, SND has presented no problems and has been courteous and respectful to staff. SND's conduct has been excellent, so much so that is it apparent that he is extremely cautious about what he says or how he acts. During the interview SND was well spoken, groomed and neat in appearance."

f) 27 August 2010 Entry: "SND has not presented any problems since his last review on 20 August 2010 and has been an overall average detainee."

g) 31 August 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an above average work and training report." The entry also notes "SND was evaluated by the Brig Psychiatrist on 27 August and was recommended to be removed from POI status. The C&A Board reviewed SND on the same date and recommended that he still remain POI. SND remains courteous and respectful to staff and has presented no problems toward staff or inmates thus far. During the interview SND was well spoken, groomed and neat in appearance."

h) 3 September 2010 Entry: "SND has not presented any problems since his last review on 27 August 2010 and has been an overall average detainee."

i) 8 September 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "SND was evaluated by the Brig Psychiatrist on 3 September and was recommended to be removed from POI status." Additionally it states, "SND continues to be cooperative with Brig staff and has presented no disciplinary problems. During the interview SND was well spoken and neat in appearance. SND's mood and appearance were consistent with his normal character and he continues to state that he is not suicidal."

j) 10 September 2010 Entry: "SND has not presented any problems since his last review on 3 SEPT 2010 and has been an overall average detainee."

k) 14 September 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "SND was evaluated by the Brig Psychiatrist on 10 September and was recommended to be removed

from POI status." Finally, the entry notes, "SND has been cooperative with Brig staff and has presented no disciplinary or behavioral problems. When observed in his cell, SND is always sitting quietly on his rack and appears to be content with doing nothing else. During the interview SND was well spoken and neat in appearance. SND's mood and appearance were consistent with his normal character and he continues to state that he is not suicidal."

l) 28 September 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "SND was evaluated by the Brig Psychiatrist on 24 September and was recommended to be removed from POI status. Later, the entry notes, "SND continues to be cooperative with Brig staff and has presented no disciplinary or behavioral problems. During the interview SND was well spoken and neat in appearance. SND's mood and appearance were consistent with his normal character and he continues to state that he is not suicidal."

m) 4 October 2010 Entry: "SND was evaluated by the Brig Psychiatrist on 24 Sep 2010 and recommended to be removed from POI. SND has not presented any problems since his last review and has been an overall average detainee."

n) 6 October 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry notes, "SND appears to be content with his situation and goes through the motions of the Brig's plan of the day without incident. SND was evaluated by the Brig Psychiatrist on 1 October and was recommended to be removed from POI status." The entry also notes, "SND continues to be cooperative with Brig staff and has presented no disciplinary or behavioral problems. During the interview SND was respectful, neat in appearance and maintained eye contact. SND's mood and appearance were consistent with his normal character and he continues to state that he is not suicidal."

o) 12 October 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an above average work and training report."

p) 14 October 2010 Entry: "SND was evaluated by the Brig Psychiatrist on (no date given) and recommended to be removed from POI. SND has not presented any problems since his last review ..." The entry also notes "SND did not receive any disciplinary reports or adverse spot evaluations and received an above average work and training report."

q) 22 October 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an above average work and training report." The entry notes, "SND was evaluated by the Brig Psychiatrist this past week and found fit from (sic) removal of prevention of injury classification from a psychiatric standpoint." The entry also notes, "SND was respectful and courteous and well spoken. SND's attitude and demeanor were consistent with his normal character and he continues to state that he is not suicidal."

r) 28 October 2010 Entry: "SND was evaluated by the Brig Psychiatrist on 15 October 2010 and recommended to be removed from POI. SND has not presented any problems since his last review on 8 October 2010 and has been an overall average detainee." Another entry on this date notes that "SND was evaluated by the Brig Psychiatrist on 22 October 2010 and recommended to be removed from POI. SND has not presented any problems since his last review on 15 October and has been an overall average detainee."

s) 2 November 2010 Entry: "SND was evaluated by the Brig Psychiatrist on 29 October 2010 and recommended to be removed from POI. SND has not presented any problems since his last review on 22 October 2010 and has been an overall average detainee."

t) 5 November 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "SND was evaluated by the Brig Psychiatrist on 29 October 2010 and found fit to be removed from prevention of injury classification from a psychiatric standpoint." Finally, the entry notes, "During the interview SND was respectful and courteous and was well spoken. SND appears to be in high spirits and have a positive attitude. SND's attitude and demeanor were consistent with his normal character and he continues to state that he is not suicidal."

u) 15 November 2010 Entry: "SND was evaluated by the Brig Psychiatrist on 13 November 2010 and recommended to ... [be removed from] POI. SND has not presented any problems since his last review on 5 NOV 2010 and has been an overall average detainee."

v) 17 November 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an above average work and training report." The entry also noted that "during the interview SND was respectful and courteous and was well spoken. SND's attitude

and demeanor were consistent with his normal character and stated that he is not suicidal."

w) 23 November 2010 Entry: "SND was evaluated by the Brig Psychiatrist on 19 November 2010 and recommended to be removed from POI. SND has not presented any problems since his last review."

x) 3 December 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report."

y) 6 December 2010 Entry: "SND was evaluated by the Brig Psychiatrist on 2 December 2010 and recommended to be removed from POI. SND has not presented any problems since his last review on [no date given] and has been an overall average detainee."

z) 7 December 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an above average work and training report." The entry also noted, "[d]uring the interview SND was courteous and well spoken and he maintained good eye contact. SND's mood and character were consistent with his normal character."

aa) 14 December 2010 Entry: "SND was evaluated by the Brig Psychiatrist on 10 December 2010 and recommended to remain on POI. (The Brig noted that this was the first time since 27 August 2010 that Capt. Hocter recommended PFC Manning remain on POI. His main criteria was that it seemed PFC Manning was not doing well). SND has not presented any problems since his last review and has been an overall average detainee."

bb) 17 December 2010 Entry: "SND was evaluated by the Brig Psychiatrist on 17 December 2010 and recommended to be removed from POI. SND has not presented any problems since his last review and has been an overall average detainee."

cc) 22 December 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an above average work and training report." The entry also notes, "overall, SND was respectful and cooperative during the interview."

dd) 29 December 2010 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also stated, "SND was evaluated by Capt. Hocter on 23 December 2010, and although further mental evaluation was deemed

necessary, SND was recommended to be removed from POI classification from a psychiatric standpoint."

ee) 6 January 2011 Entry: "SND was evaluated by the Brig Psychiatrist on 30 December 2010 and recommended to be removed from POI. SND has not presented any problems since last review and has been an overall average detainee."

ff) 7 January 2011 Entry: "SND was evaluated by the Brig Psychiatrist on 7 January 2011 and recommended to be removed from POI. SND has not presented any problems since his last review and has been an overall average detainee." The entry also notes that "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." Finally, the entry notes that PFC Manning "is respectful and courteous to staff. During the interview SND was well spoken, maintained eye contact and his demeanor was consistent with his normal character.

gg) 11 January 2011 Entry: "SND did not receive any disciplinary reports or spot evaluations and received an above average working and training report."

hh) 14 January 2011 Entry: "SND was evaluated by the Brig Psychiatrist on 14 January 2010 and recommended to be removed from POI. SND has not presented any problems since his last review and has been an overall average detainee."

ii) 18 January 2011 Entry: This is the first entry where any negative conduct is noted. This conduct is explained below.

jj) 28 January 2011 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and receive(d) an average work and training report." The entry also notes, "SND was evaluated by Col Malone on 21 January 2011 and, although further mental evaluation was deemed necessary, SND was recommended to be removed from POI classification from a psychiatric standpoint."

kk) 2 February 2011 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "SND was well spoken, respectful and maintained eye contact."

ll) 7 February 2011 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training

report." The entry also notes, "...SND was well spoken, respectful and maintained eye contact."

mm) 17 February 2011 Entry: "SND has not presented any problems since his last review and has been an overall average detainee."

nn) 25 February 2011 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "...SND was well spoken, respectful and maintained eye contact."

oo) 2 March 2011 Entry: "SND did not receive any disciplinary reports or adverse spot evaluations and received an average work and training report." The entry also notes, "...SND was well spoken, respectful and maintained eye contact."

pp) 9 March 2011 Entry: The entry notes that "SND was counseled on 2 March 2011 by the Brig supervisor for disobedience." This incident is discussed further below.

qq) 11 March 2011 Entry: "SND has not presented any problems since his last review and has been an overall average detainee."

rr) 18 March 2011 Entry: "SND has not presented any problems since his last review and has been an overall average detainee."

ss) 25 March 2011 Entry: "SND did not receive any disciplinary reports but did receive one adverse spot evaluation on 16 March 2011 for interfering with the application of hand restraints and restraint belt." The entry also notes "he was respectful and courteous..."

tt) 30 March 2011 Entry: "SND did not receive any disciplinary reports to adverse spot evaluations, and received an average work and training report."

uu) 5 April 2011 Entry: "SND has not presented any problems since his last review and has been an overall average detainee."

vv) 7 April 2011 Entry: "SND did not receive any disciplinary reports or spot evaluations, and received an average work and training report."

ww) 11 April 2011 Entry: "SND has not presented any problems since his last review and has been an overall average detainee."

xx) 15 April 2011 Entry: "SND has not presented any problems since his last review and has been an overall average detainee."

Despite being a model detainee, and despite the doctors' recommendations, PFC Manning was kept in MAX custody and under POI for the entirety of his time at Quantico, a total of 265 days.

F. The Classification and Assignment (C&A) Board Review of PFC Manning's Confinement Status

26. Under SECNAVINST 1640.9C, a Classification and Assignment (C&A) Board is required to be established and is responsible for making recommendations to the PCF Commander concerning the classification and assignment of detainees. Under the regulation, an objective based classification system is required. The purpose of the custody classification is to establish the degree of supervision needed for the control of an individual detainee. *See* Attachment 3.

27. The regulation recognizes that among detainees there are wide variations in personality and mentality. Some detainees are deliberately uncooperative. These detainees are chronic sources of trouble and may either be highly aggressive or acutely depressed. These types of detainees are identified under the regulation as being appropriately held in MAX. Detainees in MAX are those detainees "requiring special custodial supervision because of the high probability of escape, are potentially dangerous or violent, and whose escape would cause concern of a threat to life, property, or national security." *Id.* SECNAVINST 1640.9C also cautions that "[u]ltra-conservative custody classification results in a waste of prisoner and staff manpower." *Id.*

28. Classification decisions are supposed to follow "established, but flexible, procedures." The regulation notes that classifications involving MAX or MDI include the following factors:

a. Assaultive behavior.
b. Disruptive behavior.
c. Serious drug abuse.
d. Serious civil/military criminal record (convicted or alleged).
e. Low tolerance of frustration.
f. Intensive acting out or dislike of the military.
g. History of previous escape(s).
h. Pending civil charges/detainer filed.
i. Serving a sentence which the individual considers to be unjust or severe.
j. Poor home conditions or family relationships.
k. A mental evaluation indicating serious neurosis or psychosis.
l. Indication of unwillingness to accept responsibility for personal actions past and present.
m. Demonstrated pattern of poor judgment.
n. Length, or potential length, of sentence.

Although these factors apply equally to the determination of MAX or MDI, the regulation notes that MDI detainees are those that "are not regarded as dangerous or violent." *Id.* The regulation also cautions that "[o]rdinarly, only a small percentage of prisoners shall be classified as MAX." *Id.*

29. In spite of the E&O notes indicating PFC Manning was a "polite, courteous, and respectful detainee" who did not receive any disciplinary or adverse spot reports, and the repeated recommendations by the Brig psychiatrists that PFC Manning was not a risk of self-harm or of harm to others and should be removed from POI, the C&A Board consistently recommended that PFC Manning remain in MAX and POI. *See* Attachments 5 and 6. The recommendation of the C&A Board was always approved by the PCF Commander.

30. Although the C&A Board apparently met on a weekly basis, it failed to document its recommendations on the required Brig Form 4200 for over five months. *See* Attachment 6. The Brig filled out a Form 4200 on 29 July 2010 to document PFC Manning's initial intake. It did not fill out another form until 3 January 2011. *Id.* Notably, this was around the same time period that Quantico Brig began to come under outside scrutiny.

31. Week after week, month after month, the C&A Board unanimously recommended that the PCF Commander retain PFC Manning in MAX and on POI. The PCF commander always followed this recommendation. *Id.*

G. PFC Manning Is Put On Suicide Risk Status on 18 January 2011 and 2 March 2011

32. On two separate occasions, the PCF Commander elected to increase the special handling instructions on PFC Manning. The first occurred on 18 January 2011. On that date, CWO4 Averhart, over the recommendation of Capt. Hocter and the defense forensic psychiatrist, Capt. Moore, placed PFC Manning under Suicide Risk. The Suicide Risk designation resulted in PFC Manning being required to remain in his cell for 24 hours a day. PFC Manning was stripped of all clothing with the exception of his underwear. PFC Manning's prescription eyeglasses were taken away from him and he was forced to sit in his cell in essential blindness. A guard was placed, sitting in a chair, immediately outside of PFC Manning's cell. At night, PFC Manning was forced to surrender his underwear and sleep naked. PFC Manning remained on Suicide Risk until 21 January 2011 when he was then downgraded back to POI. *See* Attachments 4, 5, 6.

33. The events that led to PFC Manning being placed in Suicide Risk began when he was pulled out of his cell on 18 January 2011 for his recreation call. When the guards came to PFC Manning's cell, PFC Manning noticed a change in their usual demeanor. Instead of being calm and respectful, they seemed agitated and confrontational. Also, instead of the usual two to three guards, there were four guards. Almost immediately, the guards started harassing PFC Manning. The first guard told PFC Manning to "turn left." When he complied, the second guard yelled, "don't turn left." When PFC Manning attempted to comply with the demands of the second guard, he was told by the first, "I said turn left." PFC Manning responded, "yes, Corporal" to the first guard. At this point, the third guard chimed in by telling PFC Manning that "in the Marine

Corps we reply with 'aye' and not 'yes.'" He then asked PFC Manning if he understood. PFC Manning made the mistake of replying "yes, Sergeant." At this point the forth guard yelled, "you mean 'aye,' Sergeant."[4]

34. The harassment by the guards continued as PFC Manning was escorted to his one hour of recreation. When PFC Manning arrived at the recreation room, he was told to stand still so the guards could remove his leg restraints. As PFC Manning stood still, one of the guards yelled, "I told you to stand still." PFC Manning replied, "yes Corporal, I am standing still." Another guard then said, "you mean 'aye' Corporal." Next, the same guard said "I thought we covered this, you say 'aye' and not 'yes,' do you understand?" PFC Manning responded, "aye Sergeant." Right after PFC Manning replied, he was once again yelled at to "stand still." Due to being yelled at and the intensity of the guards, PFC Manning mistakenly replied, "yes Corporal, I am standing still." As soon as PFC Manning uttered his response he attempted to correct himself by saying "aye" instead of "yes," but it was too late. One of the guards starting yelling at PFC Manning again, "what don't you understand" and "are we going to have a problem?"[5]

35. Once the leg restraints were taken off of PFC Manning, he took a step back from the guards. PFC Manning's heart was pounding in his chest, and he could feel himself getting dizzy. Capt. Hocter determined that this event was likely an anxiety attack due to the situation. After his restraints were removed, PFC Manning sat down to avoid falling. When he did this, the guards took a step towards him. PFC Manning instinctively backed away from the guards. As soon as PFC Manning backed away, the guards walked toward him as if to prepare to restrain PFC Manning. PFC Manning immediately put his hands up in the air, and said "I am not doing anything, I am just trying to follow your orders." The guards then told PFC Manning to start walking. PFC Manning complied with their order by saying "aye" instead of "yes."

36. PFC Manning was allowed to complete his hour of recreation. During the hour, the guards did not harass PFC Manning further. The guards also did not harass PFC Manning when he was escorted back to his cell. Only later did PFC Manning learn that there had been a protest outside the gates of Quantico the previous day. The rally was intended to bring attention to the conditions of PFC Manning's confinement and had caused disruption at the main gate to Quantico.

37. After being returned to his cell, PFC Manning started to read a book. About 30 minutes later, CWO4 Averhart came to PFC Manning's cell. He asked PFC Manning what had happened during his recreation call. As PFC Manning tried to explain to him what had occurred and to convey frustration with the continued conditions of his confinement, CWO4 Averhart stopped

[4] LCPL Tankersley states, "I told [PFC Manning] to face the door. [PFC Manning] faced the door without responding. I informed [PFC Manning] that whenever a guard gives him an order, he is to respond in the correct manner (aye, aye, rank of person). [PFC Manning] then said he doesn't understand. CM2 Webb, the DBS, tried to inform [PFC Manning] that when a guard gives him an order, he needs to respond in the correct way." *See* Attachment 24.

[5] The situation with the "aye" vs. "yes" is corroborated in GM2 Webb, LCPL Tanskersly, and LCPL Cline's account of the incident. *See* Attachment 24.

PFC Manning and said "I am the commander" and "no one will tell me what to do." CWO4 Averhart also said that he was, for all practical purposes, "God." PFC Manning responded by saying, "you still have to follow Brig procedures." PFC Manning also said, "everyone has a boss that they have to answer to." As soon as PFC Manning said this, CWO4 Averhart ordered that PFC Manning be placed in Suicide Risk. After being ordered into Suicide Risk, PFC Manning became upset. Out of frustration, PFC Manning placed his hands to his head and clenched his hair with his fingers. PFC Manning then yelled, "why are you doing this to me?" He also yelled, "why am I being punished?" PFC Manning then asked CWO4 Averhart "what have I done to deserve this type of treatment?"

38. CWO4 Averhart did not answer any of PFC Manning's questions. Instead, CWO4 Averhart instructed PFC Manning to surrender all of his clothing. At first PFC Manning tried to reason with CWO4 Averhart by telling him that he had been a model detainee and by asking him to just tell PFC Manning what he wanted him to do and that he would do it. Eventually, CWO4 Averhart left and instructed Master Sergeant (MSGT) Brian R. Papakie to take over. MSGT Papakie ordered PFC Manning to take off his clothes. PFC Manning complied with the order and took off his clothes.

39. The following conversation then took place, first between PFC Manning and MSGT Papakie, and then between PFC Manning and Gunnery Sergeant (GSYGT) Craig Blenis:

> MSGT Papakie: I know what you're getting at, ok? I'm telling you that we're not outside the rules and regulations of anything that we're doing. *Period.* We're not. So I need your clothes.
>
> PFC Manning: That's fine, sir. [Manning strips to his underwear. The rest of the conversation takes place with PFC Manning in his underwear].
>
> MSGT Papakie: Skivvies say on?
>
> Other guard: yes. … leave those on.
>
> MSGT Papakie: We're going to get someone over here to talk to you. … You have one mattress, right? You have the one suicide blanket, right?
>
> PFC Manning: Yes. Yes, sir.
>
> MSGT Papakie: Shower shoes are fine. Let's get the doc over here. Doc Hocter. Sit down and see what's going on. Alright? I need you calm right now, alright? The escalation in your demeanor, alright, weighs us on the side of caution. Do you understand that?
>
> PFC Manning: Yes, MSGT.

MSGT Papakie: The best way to explain that to you is you had an outburst. You were moving around. You almost punched a wall. You're kind of throwing yourself around in the cell. To make sure you don't hurt yourself we're putting you on a suicide risk status. We're upgrading your status.

PFC Manning: But I'm not a suicide risk.

MSGT Papakie: That's not for me to decide. I have to make sure, the brig officer has to make sure, that you're taken care of.

PFC Manning: I understand MSGT.

MSGT Papakie: In the manner that you're not going to hurt yourself. Right now, I don't know that. With the display I saw right now, I'm not comfortable with. He's not comfortable with. Until we get something otherwise, this is how it's going to be.

PFC Manning: Why was I on, why was I on prevention of status for almost 6 months?

MSGT Papakie: [chuckles to himself] I know this is no secret to you … I have plenty of documentation. Plenty of documentation based on things that you've said, things that you've done. Actions – I have to make sure, we have to make sure, that you're taken care of.

PFC Manning: Yes, MSGT.

MSGT Papakie: Things that you've said and things that you've done don't steer us on the side of "ok, well, he can just be a normal detainee." They make us stay on the side of caution.

PFC Manning: But what about recommendations by the psychiatrist to remove me off the status?

MSGT Papakie: Who's here every day? Who's here every day? We are. Who sees you every day? That's all he is, is a recommendation. We have, by law, rules and regulations set forth to make sure from a jail standpoint that Bradley Manning does not hurt himself. Maybe from a psychiatric standpoint, the recommendation he's given, I get it, I got it, understand, OK? But he's not the only decision maker. A mental health specialist is not the only decision that gets made.

PFC Manning: I understand that, sir.

MSGT Papakie: However…

[MSGT Papakie leaves and GYSGT Blenis enters] [inaudible]

PFC Manning: I got dizzy …

GYSGT Blenis: Wasn't dehydration?

PFC Manning: No, I was anxious because I didn't know why the guards were so edgy. … They raised their voice … And I didn't … I was getting anxious because they were getting anxious. So I was trying to figure out what was the cause of them getting anxious. It seemed to me that they were looking for something wrong…

GYSGT Blenis: Something wrong as in a rules violation, or something wrong as in …

PFC Manning: Yes.

GYSGT Blenis: Rules violation?

PFC Manning: Yes, sir. Because I've been here for a long time, so everything becomes automatic. So I don't know if I say something and they respond. I don't know what happened. I've been in, inside so long – I don't remember the last time I was outside.
…

[Portions of the rest of the dialogue between Blenis and PFC Manning are inaudible]

GYSGT Blenis: So, let's go back to when you fell down. Did you fall down or did you sit down? Or …

PFC Manning: Ah, it was mixed. I mean, I was getting lightheaded because I was hyperventilating. So, I was trying to stand up. I was trying to keep from falling because I was worried that if I fell, then everybody would panic and that would make matters worse. So, I tried to stand up and I ended up falling…
…

GYSGT Blenis: Take me from end of rec hall to … where we are now …

PFC Manning: Ok, yes, I started, I got in here and it was normal. And then I started reading my book. And then, I want to say it was MSGT [inaudible] that was the first to show up. And then he came in and was asking me all these

questions. I was, ah, trying to figure out how to word the answers without causing any more anxiety. I was trying to figure out ways of not sounding, or not being construed as ... ways that things weren't going to be construed so that ... just trying to figure out ways in which I could tactfully say what I was trying to say without violating any rules and regulation or raise any concern about ...

GYSGT Blenis: Concern's already raised... [inaudible]

PFC Manning: Yes, but I'm trying not, I'm trying, I'm trying to avoid the concern, and it's actually causing the concern. I mean, cause, I'm getting ... every day that passes by, I'm getting increasingly frustrated, I'm not going to lie. Because I'm trying to do everything that I can *not to be* a concern, therefore I appear as though I am causing more concern. Or I ... Or it seems that I'm causing more concern or everybody's looking for something to cause concern. So that's what frustrates me. ... Trying to work out the most politically correct way of ...

GYSGT Blenis: [largely inaudible] Let's go back to today. ... The anxiety here, today. That's not the first time it's happened since you've been in confinement. As far as I know, it is the first time it's happened since you've been here ... but a similar situation ...

PFC Manning: I wasn't, in Kuwait, I had no idea what was going on generally.

GYSGT Blenis: But, would you say it was similar situation?

PFC Manning: No, no. The situation that happened today was more of ... you know, I'm lucid and aware and just trying to figure ... It's just a question of trying not to appear like I was in Kuwait. Because that's my main concern every day, is how do I get off of POI status? How do I get off of POI status? When will I be taken off of POI status? What is being used to justify the precautions? You know ... What concerns, you know, what am I doing that's concerning [inaudible]? So I'm constantly trying to figure out, run through all of those things. And trying to make sure I'm not doing anything...

GYSGT Blenis: [inaudible] ... As time goes on, we have less of a concern, ok?

PFC Manning: Yes, GYSGT. But the restrictions were still in place. And I was ...

GYSGT Blenis: Right. And we continually... We understand it's not normal that we have someone in POI for this period of time...

PFC Manning: Yes.

GYSGT Blenis: It's not [normal] … I guess we'll just leave it at that. So as we go on, we're going to lessen your restrictions. They're still be restrictions in place … [inaudible] But I would have to disagree with you as far as what happened today happened in Kuwait … anxiety attack …

PFC Manning: No, in Kuwait, I wasn't lucid. I had …. [guard interrupts]. It was like a dream…

GYSGT Blenis: But, they both ultimately ended up in you having an anxiety attack … controlled fall, but …

PFC Manning: No, I don't remember falling in Kuwait at all.

GYSGT Blenis: Well, I can tell you, that's what was reported to us … none of us were there [refers again to PFC Manning's suicide status Kuwait] … Us, as a facility, we have to always err on the side of caution, okay. And not just the side of caution, but over-caution. Especially when we're talking about suicide, okay? Nobody's saying you're going to kill yourself, alright? [inaudible] But we always have to be more cautious than that. But you're saying that 'nobody else is on suicide watch.' The thing is what happened in Kuwait, what happened today …

PFC Manning: Those are totally different. I understand, I understand, I understand, where you're getting that ... from the documentation. I mean, I quite, I know where I am. I know I am … I know I am at Quantico base facility. I know that I'm at a brig. I mean, I'm lucid and aware of where I am. I'm not …

GYSGT Blenis: You asked [MSGT] a question … about why you're on suicide watch, I'm trying to answer that question, okay? Did I answer that?

PFC Manning: Uh – no. No, with context. Because the fact that …

GYSGT Blenis: [inaudible] Did you understand that?

PFC Manning: I would have understood had … had I not been … I would have understood had … had I not been … I mean, I'm trying to think of how to word this proper …

GYSGT Blenis: Provoked? Provoked?

PFC Manning: Yes, a little. I feel like the facility, honestly, I feel like the facility is looking for reasons to keep me on POI status.

GYSGT Blenis: Inaudible. I can tell you 'no'…

PFC Manning: I mean, at least not at the staff level, I'm thinking the CO – me, myself, personally.

GYSGT Blenis: Inaudible … From a logistical standpoint, it's a burden on us. …

PFC Manning: Yes, MSGT.

GYSGT Blenis: Nobody finds that as a joy. It's not a punitive thing, I understand why someone would see it as a punitive thing because restrictions placed [inaudible] … I can tell you that … since you have been here … I wish I had a hundred Mannings …

PFC Manning: And that's what… And that's where I don't understand why the continuation of the policy and restrictions beyond the time recommended by you and the psychiatrist. I mean the psychiatrist, is saying. I mean, I've got my own forensic psychiatrist that's saying now that the POI status is actually doing psychiatric harm and not, you know, and it's actually, you know, increasing my chances, rather than decreasing…

GYSGT Blenis: Did you feel like that two weeks ago?

PFC Manning: What's that?

GYSGT Blenis: Did you feel like that two weeks ago?

PFC Manning: Yes GYSGT.

GYSGT Blenis: Uh, two weeks ago, I asked you, like, how you were feeling and you said you were fine, do you remember that?

PFC Manning: Yes, and I still feel fine. I mean, I feel, I feel fine, but at the same time, I've been putting in, I've been putting in…

See Attachment 25.

40. Later that day, Capt. Hocter and Capt. Moore arrived at the facility. Capt. Hocter and Capt. Moore interviewed PFC Manning and assessed his mental state. They did not concur with CWO4 Averhart's decision to place PFC Manning on Suicide Risk status. Both mental health professionals believed PFC Manning was not a suicide risk. Out of an abundance of caution, Capt. Hocter recommended that PFC Manning be placed in 24 hour POI status. CWO4 Averhart ignored this recommendation and kept PFC Manning on Suicide Risk status. *See* Attachments 2, 4, 7, 8.

41. In CWO5 Abel Galaviz's investigation of the conditions of PFC's Manning's confinement, he found that the failure to immediately take PFC Manning off of Suicide Risk status upon the psychiatrist's recommendation was in violation of Navy rules:

> It warrants mentioning, however, that on two occasions, 6 August 2010 and 18 January 2011, a medical officer determined that suicide risk status was no longer warranted and the brig staff did not immediately take PFC Manning off suicide risk status. ... Paragraph 4205.5b of reference (a) states "When prisoners are no longer consider to be suicide risks by a medical officer, they shall be returned to appropriate quarters," in these cases, once the medical officer's evaluation was provided to the brig staff, steps should have been taken to immediately remove him from suicide risk, to a status below that.

See Attachment 22.

42. Col. Daniel J. Choike, the Commander of Marine Corps. Base, Quantico, balked that Quantico had done anything wrong by not removing PFC Manning from Suicide Risk upon the recommendation of a medical health provider, stating "there is no requirement ... that requires an immediate removal from suicide risk after the PCF mental health care provider or medical officer recommends it." *See* Attachment 18. Tellingly, though, Col. Choike later changed the Brig regulation such that a medical provider's opinion on terminating suicide risk status would be binding on the Brig. *See* Attachment 19.

43. The second incident where the special handling instructions were increased occurred on 2 March 2011. On that date, PFC Manning was informed by Col. Choike that no relief would be granted with respect to PFC Manning's previously-filed Article 138 Complaint. Understandably frustrated by this decision after enduring (at that point) over seven months in unduly harsh confinement conditions, PFC Manning asked the Brig Operations Supervisor, MSGT Papakie, what he needed to do in order to be downgraded from MAX and POI. MSGT Papakie responded by essentially telling PFC Manning that there was nothing he could do to downgrade his detainee status and that the Brig simply considered him a risk of self-harm. Out of frustration, PFC Manning responded that the POI restrictions were absurd. PFC Manning sarcastically told MSGT Papakie that if he wanted to harm himself, he could conceivably do so with the elastic waistband of his underwear or with his flip-flops. MSGT Papakie did not indicate to PFC Manning at that time that he was concerned about PFC Manning's comment.

44. Later that same day, PFC Manning was approached by GYSGT Blenis. GYSGT Blenis asked PFC Manning what he had done wrong. He told PFC Manning that the new PCF Commander, CWO2 Denise Barnes, had ordered PFC Manning to be stripped naked at night. PFC Manning responded that he had not done anything wrong. PFC Manning told GYSGT Blenis that he had just pointed out the absurdity of his current confinement conditions.

45. Without consulting any of the Brig's mental health providers, CWO2 Barnes increased the restrictions imposed upon PFC Manning under the pretense that PFC Manning was a suicide

risk. *See* Attachment 4. PFC Manning was not, however, placed under the designation of Suicide Risk. In order to keep PFC Manning in Suicide Risk, CWO2 Barnes would have needed a supporting recommendation from one of the Brig's mental health providers. While CWO2 Barnes needed the Brig psychiatrist's recommendation to keep PFC Manning under Suicide Risk, no such recommendation was needed in order to increase PFC Manning's special handling instructions under POI.

46. In response to this specific incident, COL Malone met with the PFC Manning. After speaking to PFC Manning, he assessed PFC Manning as a "low risk and requiring only routine outpatient follow-up [with] no need for ... closer clinical observation." *See* Attachment 2. In particular, he indicated that PFC Manning's statement about the waist band of his underwear was in no way prompted by "a psychiatric condition." *Id.* Rather it was part of his process of "intellectualizing" the conditions of his confinement.

47. CWO2 Barnes chose to ignore the assessment by COL Malone. From 2 March 2011 until the time he was transferred to the Joint Regional Correctional Facility (JRCF) at Fort Leavenworth, Kansas on 20 April 2011, PFC Manning was stripped of all his clothing at night. For the first couple of days, after surrendering his clothing to the Brig guards at night, PFC Manning had no choice but to lay naked in his cold jail cell until the following morning.

48. On 3 March 2011, PFC Manning was told to get out of bed for the morning DBS inspection. PFC Manning was not given any of his clothing back before the morning inspection. PFC Manning walked towards the front of his cell with his suicide blanket covering his genitals. The Brig guard outside his cell told him that he was not permitted to cover himself with his blanket because that would mean that he would not be standing at parade rest. PFC Manning relinquished the blanket and stood completely naked at parade rest, which required him to stand with his hands behind his back and his legs spaced shoulder width apart. PFC Manning stood at parade rest for about three minutes until the DBS arrived. Once the DBS arrived, everyone was called to attention. The DBS and the other guards walked past PFC Manning's cell. The DBS looked at PFC Manning, paused for a moment, and then continued to the next detainee's cell. After the DBS completed his inspection, PFC Manning was told to go sit on his bed. Several minutes later, PFC Manning was given his clothes and allowed to get dressed. PFC Manning was also required to stand naked at attention the next four days.

49. After apparent outside pressure on the Brig due to PFC Manning's mistreatment, PFC Manning was provided with a suicide smock to wear at night. *See* Attachment 26. However, due to PFC Manning's size and the coarseness of the smock, he had difficulty sleeping. PFC Manning is five foot three in height and weighs approximately 115 pounds. The smock was not designed for someone of his size. On one occasion, PFC Manning was being choked by the smock and was unable to free himself. As PFC Manning struggled to get out of the smock, two guards entered his cell and assisted in removing PFC Manning from the smock. *See* Attachment 27.

50. To recap, on 18 January 2011 and 5 March 2011, the Brig increased the already onerous restrictions placed on PFC Manning in the following manner:

a) From 18 January 2011 until 20 January 2011, PFC Manning was forced to strip down to his underwear during the day.

b) From 18 January 2011 until 20 January 2011, PFC was forced to sleep naked at night.

c) From 18 January 2011 until 20 January 2011, PFC Manning's eyeglasses were taken away from him.

d) From 18 January 2011 until 20 January 2011, PFC Manning was not permitted out of his cell and was on 24-hour suicide watch.

e) From 2 March 2011 until 6 March 2011, PFC Manning was forced to surrender all his clothing at night and sleep naked.

f) From 2 March 2011 until 6 March 2011, PFC Manning was forced to surrender his eyeglasses during the day and at night. After 6 March 2011, his eyeglasses were returned to him during the day, but continued to be removed from him at night.

g) On 3 March 2011 until 6 March 2011, PFC Manning forced to stand naked at parade rest where he was in view of multiple guards.

h) From 7 March 2011 onward, PFC Manning was required to wear a heavy and restrictive suicide smock which irritated his skin and, on one occasion, almost choked him.

H. Col. Robert Oltman's Order that PFC Manning Would Not Be Downgraded from POI and MAX

51. On 13 January 2011, Col. Robert G. Oltman, the Security Battalion Commander and senior rater of the Brig Commander, held a meeting to discuss PFC Manning's confinement conditions. The current Brig Commander, CWO4 Averhart, and his leadership staff were present. So too was the incoming Brig Commander, CWO2 Barnes. Along with the Brig leadership, the Brig psychiatrists (Capt. Hocter and Capt. Moore) and the Brig Judge Advocate, were also present.

52. At that meeting, Col. Oltman ordered that PFC Manning would be held in maximum custody and POI indefinitely. Col. Oltman stated that "nothing is going to happen to PFC Manning on my watch." Col. Oltman also said, "nothing's going to change. He won't be able to hurt himself and he won't be able to get away, and our way of making sure of this is that he will remain on this status indefinitely." At this point, Capt. Hocter go very upset and voiced his concerns. Capt. Hocter said something to the effect of, "Sir, I am concerned because if you're going to do that, maybe you might want to call it something else, because it's not based on anything from

behavioral health." In response, Col. Oltman said "We'll do whatever we want to do. You [the Brig psychiatrists] make your recommendation and I have to make a decision based on everything else." Capt. Hocter responded, "Then don't say it's based on mental health. You can say it's MAX custody, but just don't say that we're somehow involved in this." Col. Oltman said, "That's what we're going to do."

53. Col. Oltman made it clear to those present at the meeting that the decision to keep PFC Manning in MAX and POI was coming from those higher in the chain of command. *See* Attachment 8 ("He indicated that Manning would remain in current status (POI) unless and until he received instructions from higher authority (unnamed). I do not recall him saying he would be kept that way until his legal process was complete, but the impression he left was not to expect any changes in the near future."; "The Security Battalion Commander intimated that he was receiving instructions from a higher authority on the matter but did not say from whom.").

54. During this meeting, Capt. Moore informed Col. Oltman that he would likely be appointed as a member of the Defense team. In response, Col. Oltman told him that "that's not going to happen, doc." The next day, 14 January 2011, Capt. Moore received his appointment order assigning him as a member of the Defense team. After this date, Capt. Moore was no longer invited to attend the weekly meetings with Col. Oltman.

55. Capt. Hocter was also aware that Installation Commander, Col. Choike, had frequent, sometimes weekly, meetings to discuss PFC Manning's confinement classification and assignment. As part of these meetings, Capt. Hocter was required to provide the Brig Commander with a status report on PFC Manning. *See* Attachment 8 ("I know that the higher base authorities had a frequent (sometimes weekly) meeting to discuss Manning, for which I supplied my CO with a status report – nothing that Manning had told me, mind you, but his condition and my recommendations, particularly to remove conditions I felt were unnecessary.").

I. Domestic and International Reaction to PFC Manning's Conditions of Confinement

56. The conditions of PFC Manning's confinement while at Quantico sparked domestic and international outrage. Among those that spoke out about PFC Manning's inhumane conditions of confinement were the following:

a) Amnesty International wrote a letter calling for the restrictive conditions of confinement to be lifted; *See* Attachment 28.
b) A group of 300 law professors denounced the confinement conditions being endured by PFC Manning as being "degrading", "inhumane," "illegal," and "immoral"; *See* Attachment 29.
c) Preeminent constitutional law scholar Professor Laurence Tribe spoke out that the conditions under which PFC Manning was being held were "not only shameful but unconstitutional"; *See* http://www.guardian.co.uk/world/2011/apr/10/bradley-manning-legal-scholars-letter.

d) Psychologists for Social Responsibility wrote a letter outlining the very harmful effects of prolonged solitary confinement and implored officials to "rectify the inhumane, harmful, and counterproductive treatment of PFC Manning"; *See* Attachment 30.
e) Department of State spokesman P.J. Crowley referred publicly to PFC Manning's conditions of confinement being "ridiculous and counterproductive and stupid." He was later fired for his comment. *See* http://www.guardian.co.uk/commentisfree/cifamerica /2011/mar/29/bradley-manning-wikileaks.
f) European leaders urged the United States to allow the United Nations to investigate claims of illegal pretrial punishment; *See* Attachment 31.
g) Concerned citizens called Quantico and organized rallies and marches to bring awareness to PFC Manning's conditions of confinement.
h) Congressman Kucinich pleaded for access to PFC Manning and compared the conditions of his confinement to Abu-Ghraib; *See* http://kucinich.house.gov/news/documentsingle.aspx?DocumentID=227362.

All these pleas fell upon deaf ears. Quantico continued to hold PFC Manning under MAX and in POI (or under Suicide Risk) for almost nine months.

57. Additionally, the United Nations Special Rapporteur on Torture, Mr. Juan Méndez, tried for months to set up an unmonitored meeting with PFC Manning where he could investigate claims of illegal pretrial punishment. All his requests were denied.[6] In a letter to Mr. Méndez from Jeh Johnson, General Counsel for the Department of Defense, Mr. Johnson told Mr. Méndez "You should have no expectation of privacy in your communications with PFC Manning." *See* Attachment 32.

58. Mr. Juan Méndez published his findings in the 29 February 2012 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

United States of America

(a) UA 30/12/2010 Case No. USA 20/2010 State reply: 27/01/2011 19/05/2011 Allegations of prolonged solitary confinement of a soldier charged with the unauthorized disclosure of classified information.

170. The Special Rapporteur thanks the Government of the United States of America for its response to this communication regarding the alleged prolonged solitary confinement of Mr. Bradley E. Manning, a US soldier charged with the unauthorized disclosure of classified information. According to the information received, Mr. Manning was held in solitary confinement for twenty-three hours a day following his arrest in May 2010 in Iraq, and continuing through his transfer to the brig at Marine Corps Base Quantico. His solitary confinement - lasting

[6] Congressman Dennis Kucinich and officials at Amnesty International also tried to set up an unmonitored visit with PFC Manning, also to no avail.

about eleven months - was terminated upon his transfer from Quantico to the Joint Regional Correctional Facility at Fort Leavenworth on 20 April 2011. In his report, the Special Rapporteur stressed that "solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions." Moreover, "[d]epending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture." (A/66/268 paras. 79 and 80) Before the transfer of Pfc Manning to Fort Leavenworth, the Special Rapporteur requested an opportunity to interview him in order to ascertain the precise conditions of his detention. The US Government authorized the visit but ascertained that it could not ensure that the conversation would not be monitored. Since a non-private conversation with an inmate would violate the terms of reference applied universally in fact-finding by Special Procedures, the Special Rapporteur had to decline the invitation. In response to the Special Rapporteur's request for the reason to hold an unindicted detainee in solitary confinement, the government responded that his regimen was not "solitary confinement" but "prevention of harm watch" but did not offer details about what harm was being prevented. To the Special Rapporteur's request for information on the authority to impose and the purpose of the isolation regime, the government responded that the prison rules authorized the brig commander to impose it on account of the seriousness of the offense for which he would eventually be charged. The Special Rapporteur concludes that imposing seriously punitive conditions of detention on someone who has not been found guilty of any crime is a violation of his right to physical and psychological integrity as well as of his presumption of innocence. The Special Rapporteur again renews his request for a private and unmonitored meeting with Mr. Manning to assess his conditions of detention.

(b) AL 15/06/2011 Case No. USA 8/2011 State reply: None to date Follow-up to a letter sent 13 May 2011 requesting a private unmonitored meeting with Private (Pfc.) Bradley Manning.

171. The Special Rapporteur thanks the Government of the United States of America for its response to the communication dated 13 May 2011 requesting a private unmonitored meeting with Private Bradley Manning. Regrettably, to date the Government continues to refuse to allow the Special Rapporteur to conduct private, unmonitored, and privileged communications with Private Manning, in accordance with the working methods of his mandate (E/CN.4/2006/6 paras. 20-27).

Id.

59. Mr. Méndez told the British newspaper, The Guardian, that: "I conclude that the 11 months under conditions of solitary confinement (regardless of the name given to his regime by the prison authorities) constitutes at a minimum cruel, inhuman and degrading treatment in violation of article 16 of the convention against torture. If the effects in regards to pain and suffering inflicted on Manning were more severe, they could constitute torture." *See* http://www.guardian .co.uk/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un.

60. The Defense tried repeatedly to assist Mr. Méndez (along with Congressman Kucinich and Amnesty International) in setting up an unmonitored visit with PFC Manning. The Government, along with the Brig, insisted that none of these would qualify as an "official" visit, and therefore must be monitored.

61. The Quantico Brig rules provide for both "authorized visits" and "official visits." The latter are not monitored. The rules provide as follows:

> 3.17. CORRESPONDENCE AND VISITATION: Confinement should not stop a prisoner from keeping in contact with members of their immediate family and authorized visitors via mail or personal visits. Each prisoner's family will be interested in their progress and concerned about their well-being and morale. Morale is a two way street and family members need be encouraged just as much as the prisoner. Prisoners are strongly urged to correspond and arrange visits. Prisoners are encouraged to place all potential visitors on their visitor list even if the chance or their visiting is remote. In the event during your confinement you wish to add additional people to the visitation list you must submit a DD Form 510 with name, relationship, age, and address to the Admin Chief. The following guidelines are applicable:
>
> a. Authorized: No limitations will be imposed as to the number or persons who may visit with a prisoner, except as to maintain security, control, or to exclude persons disapproved by the Commanding Officer for cause. Authorized visitors include the prisoner's immediate family (spouse, children, parents, brothers, sisters or guardians) or anyone who has established a proper relationship with the prisoner prior to him being confined.
>
> b. Official: These visits are for the purpose of conducting official government business, either on behalf of the prisoner or in the interest of justice. Visits from lawyers, military officials, civilian officials, or anyone listed as a privileged correspondence in paragraph 3.17f of this regulation, having official business to conduct are considered official visits and may be authorized by the Commanding Officer to visit at any time during normal working hours. All prisoners will be required to see official military visitor(s). Refusal to visit with official military visitors will be subject to disciplinary action.
>
> ...

Privileged Correspondence: All incoming and outgoing correspondence (mail) between a prisoner and the following is privileged and not subject to inspection unless reasonable doubt exists as to the correspondence being bona fide:

a. The President or Vice President of the United States.
b. Members of Congress of the United States.
c. The Attorney General of the United States and Regional Offices of the Attorney General.
d. The Judge Advocate General of each military service or his/her representatives.
e. Prisoners Defense Counsel or any military/civilian attorney of record.
f. Any attorney listed in professional or other directories or an attorney's representative.
g. Prisoner's clergyman, when approved by the chaplain.

See Attachment 34.

62. On 31 March 2012, Mr. Coombs wrote the following to CPT Fein:

I have informed Congressman Kucinich that he is authorized to visit PFC Manning under the rules and regulations for the Quantico Brig. Under Brig Order P1640.1C, paragraph 3.17, there are two types of visitors for a detainee, authorized and official.

1) Authorized visitors are required to be added by the detainee and approved by the Quantico Brig. Any person added to the authorized visitors list may visit the detainee on any Saturday or Sunday between the hours of 12:00 and 3:00 p.m. These visits are monitored by the Brig. The Brig requires the visits to take place in a no-contact booth for any detainee held in Maximum Custody. The doors to the booth must remain open and the entire visit will be recorded by the Brig. Anything said during these visits is not privileged and can be used later by the government in a court-martial proceeding.

2) Official visitors are for the purpose of conducting official government business, either on behalf of the detainee or in the interest of justice. Official visits may be authorized by the Brig Officer to visit a detainee at any time during normal working hours. The official visits are considered privileged, and are not subject to recording or monitoring. The Brig's rules and regulations identify the following individuals as qualifying for official visits:

a) Military officials.
b) Civilian officials.

> c) The President or Vice President of the United States.
> d) Members of Congress of the United States.
> e) The Attorney General of the United States and Regional Offices of the Attorney General.
> f) The Judge Advocate General of each military service or his or her representative.
> g) Prisoner's Defense Counsel or any military or civilian attorney of record.
> h) Any attorney listed in professional or other directories or an attorney's representative.
> i) Prisoner's clergyman when approved by the chaplain.
>
> Given the difference between authorized and official visits, PFC Manning does not want to waive his entitlement to have a privileged conversation with Congressman Kucinich. You should know, that Amnesty International is also making a request for an official visit as well as Mr. Juan Mendez, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.
>
> I have recommended that each of the above individuals contact the facility directly to arrange for an official visit. I am hoping that you will indeed ensure that the Quantico Brig honors its own rules and regulations.

See Attachment 33.

63. On 1 April 2011, Mr. Coombs contacted Lt. Col. Greer, the Staff Judge Advocate for Marine Corps. Base Quantico, regarding an official visit:

> I have been informed by Congressman Kucinich's office and by Amnesty International that they have been told by your office they do not qualify for an official visit. Instead, they are being directed to request to be added to PFC Manning's "authorized" visitors list. Additionally, Congressman Kucinich's office is being told that the Brig Order that his office is referencing does not exist. I have seen Brig Order P16401C, dated 1 July 2010. This order clearly provides for both authorized and official visits.

Id. Thus, it appears that Brig Officials lied to Congressman Kucinich about the very existence of Brig Order P16401C.

64. On 5 April 2011, CPT Fein responded:

> 1. Brig Visitors.

While we understand your view of the Brig Order, we respectfully disagree with your interpretation of the attached relevant portion of the Brig Order with regard to visitation.

While you correctly recite what an "authorized" visitor is, an "official" visit is "for the purpose of conducting official government business, either on behalf of the prisoner or in the interest of justice," see para 3.17b. The next sentence simply states that "lawyers, military officials, civilian officials, or anyone listed as a privileged correspondence in para 3.17f . . . having official business to conduct are considered official visits" (emphasis added) and may visit at any time during normal working hours, subject to authorization by the Commanding Officer. Critical is the next sentence, "All prisoners will be required to see official military visitor(s)" (emphasis added). Therefore, an official visit to the brig by a Member of Congress conducting official government business or by a non-government organization's representative does not necessarily include a visit with PFC BM without PFC BM's consent.

You also state, "official visits are considered privileged, and are not subject to recording or monitoring" (emphasis added); however this not in the Brig Order. As noted in para 3.17f, which you cite as the authority, "all incoming or outgoing correspondence (mail) between a prisoner and the following is privileged and not subject to inspection," refers to, as stated, "mail" and not visitation (emphasis added). While you also state, "The Brig's rules and regulations identify the following individuals as qualifying for official visits," the reference you cite (para 3.17f) provides a list of government officials, including "Members of Congress." Again, that para refers to "mail" and not visitation protected under Section V of the MRE. Therefore, a visit by a Member of Congress would not be privileged within the meaning of the Brig Order, and would be monitored just like any other visitor.

The prosecution and brig's interpretation of the Brig Order outlines these types of visitors:

a. "Authorized" visitors. Visitors that PFC BM places on his visitation list.
b. "Official" visitors. Those officials listed in para 3.17b conducting official government business.

A person's membership in an organization does not necessarily confer upon that person "official" status. A Member of the Congress is conducting an "official" visit if he is conducting official Government business.

A member of a non-government organization is not "official" as they are not conducting government business. Should PFC BM desire to meet with any of the individuals whom you have mentioned as potential visitors, he will need to either

add them to his "authorized" visitor list or approve a meeting, through you, if the individuals make an "official" visit. As you know, from the beginning of PFC BM's confinement at Quantico, the rule requiring an "authorized" visitor to have a preexisting relationship with PFC BM has been relaxed to allow any visitor to visit, subject to standard security vetting and monitoring for national security purposes. This accommodation was based on the potential for his long-term pretrial confinement and for his benefit, well-being, and morale.

Regardless of the interpretation of the Brig Order, the SPCMCA issued a standing order on 16 Sep 10, which directs the Brig to monitor communications of third parties while confined at the Brig. This requirement includes all of PFC BM's phone calls, visitations, and mail. This requirement does not include monitoring of any privileged communications between PFC BM and his attorneys, mental health providers, and brig chaplains.

Further, as the United States has charged your client, you surely acknowledge our concern that PFC BM's right to counsel be scrupulously honored. Absent the command's weekly visit, which is limited to discussing PFC BM's welfare, we would not allow a U.S. Government representative to meet with your client without counsel being present or an affirmative waiver of that right by PFC BM. Properly adding a visitor as an "authorized" visitor will be deemed consent to speak with a government representative by the defense. Any such visit will be subject to monitoring unless it is subject to a recognized privilege under Section V, MRE (falls under the SPCMCA's exception).

In the future, please do not direct any organization to directly contact the Brig to coordinate any visit. If someone is trying to coordinate a formal meeting in an "official" capacity, they should coordinate through DOD Legislative Affairs (COL Tia Johnson) and their request to meet with PFC BM will be ultimately forwarded through you to PFC BM for consent to meet during such a visit.

We will continue to notify you when we receive information that someone wishes to meet with your client in an "official" capacity, and request the same courtesy in return, once your client agrees to meet with them.

Id.

65. On 6 April 2010, Mr. Coombs sent the following response to CPT Fein:

1. Thank you for your reply. Is the interpretation of the Brig Order the MDW SJA's interpretation, the Quantico Brig's interpretation, or simply your interpretation?

The sentence that you gloss over in your reply is actually the critical one from the Brig Order. This sentence states that "[v]isits from lawyers, military officials,

> civilian officials, or anyone listed as a privileged correspondence in paragraph 3.17f of this regulation, having official business to conduct are considered official visits..." (Emphasis added). Congressman Kucinich, Mr. Juan Mendez from the United Nations, and any representative from Amnesty International would clearly fall within the scope of individuals identified in paragraph 3.17f and are therefore deemed to be official visits under the Brig Order.
>
> Under the interpretation advanced in your previous message, a member of Congress is conducting an "official" visit only if he is conducting "official government business" and a member of a non-government organization is not "official' as they are not conducting "government business." Besides being an [sic] perfunctory argument without support under the Brig Order, it is also one that is easily nullified by using the example of a civilian attorney. Paragraph 3.17f states that a "civilian attorney of record" is deemed to be an official visit. A civilian attorney is clearly a non-government entity and as such is not conducting "official government business." This clearly belies any attempt to argue official visits are limited in the way that you suggest.
>
> Moreover, official visits are clearly privileged under the Brig Order. While section 3.17f speaks to mail correspondence being privileged, it must follow that oral communications are also privileged. It would not make sense that a detainee would enjoy the protection of a privileged communication from an individual listed in paragraph 3.17f if the correspondence came by way of mail as opposed to an in-person conversation with the same individual.
>
> With regards to the SPCMCA's standing order dated 16 September 2010, his failure to recognize other individuals who are entitled by the Brig Order to have a privileged conversation is not dispositive. The order is unenforceable given the fact it would authorize the recording of privileged conversations. Likewise, the government's concern surrounding PFC BM's right to counsel is misplaced. Mental health providers and brig chaplains are able to speak with PFC BM without coordination with civilian counsel. As long as the conversations are privileged, the government's concern would seem unwarranted.
>
> Given the above, I request that you clarify the Quantico Brig's official position on this issue.

Id.

66. CPT Fein then clarified on 7 April 2011 that "Our interpretation is the Government's interpretation, to include the SJA and the Brig." *Id.* Owing to the interpretation of the Brig policy, PFC Manning was never permitted an unmonitored visit with the United Nations Special Rapporteur on Torture, Congressman Dennis Kucinich, or Amnesty International.

J. PFC Manning's Repeated Pleas for Relief From the Onerous Conditions of His Confinement

67. PFC Manning repeatedly requested to be removed from MAX and POI. Additionally, PFC Manning's civilian counsel made numerous requests of the United States Army Staff Judge Advocate's Office for the Military District of Washington to assist in removing PFC Manning from MAX and POI.

68. In the fall of 2010, Mr. Coombs and CPT Fein had several telephone conversations about the onerous conditions of PFC Manning's confinement. On 3 December 2010, Mr. Coombs wrote to CPT Fein asking whether he had "an update on the POI issue with PFC Manning." *Id.* Mr. Coombs continued,

> Capt. Hocter saw PFC Manning on Thursday. It is my understanding that after speaking with PFC Manning, he is still recommending that the POI restrictions be lifted. As mentioned earlier, given the recommendation of Capt. Hocter, I do not believe the confinement facility has a legitimate non-punitive basis to keep PFC Manning on the POI status. Additionally, it is my understanding that other than in this instance, the confinement facility has never had anyone under POI restrictions for this length of time. This fact also cuts against a legitimate non-punitive basis.

Id. CPT Fein responded, "Although I understand your concern we are absolutely working this issue as our highest priority. Currently, there is a disconnect in multiple services with multiple competing regulations and we have to ensure the correct applicable rules apply." *Id.*

69. On 8 December 2010, CPT Fein had still not addressed the POI issue. Mr. Coombs wrote to him again saying, "How is the POI issue coming along? My understanding is that Capt. Hocter is still recommending that the POI be lifted." *Id.* CPT Fein responded, "we are still actively addressing the POI issue with Quantico." *Id.* Mr. Coombs responded,

> Do you have a time-table on the POI issue. Earlier today, I spoke with Capt. Hocter. He told me that he is still recommending that PFC Manning be taken off of POI status. He told me that the behavior witnessed by the guards appears to be a result of a side effect from PFC Manning's sleep medication.
>
> As I have said before, I believe the current confinement conditions rise to the level of unlawful pretrial punishment. Mr. Averhart does not have a legitimate basis to continue to ignore the advice of his mental health professional. Maintaining the POI status prevents PFC Manning from exercising, having basic items such as a pillow and sheet, and subjects him to prolonged isolation. Please tell me what you have done so far to address this issue, and the additional steps that you plan to take to resolve it.

Id. The next day, on 9 December 2010, CPT Fein responded to Mr. Coombs, stating, "Tomorrow the Quantico Brig is holding their Classification and Assignment Board, which makes recommendations to the Brig OIC. We requested the OIC to consider the issues you presented in his determination of PFC Manning's status. We should find out by COB tomorrow on whether his status is going to change." *Id.*

70. Of course, PFC Manning was not taken off MAX or POI status. And it is clear that CPT Fein and the Government did not advocate for the rights of PFC Manning during this period despite repeated protestations from the Defense that PFC Manning was being subjected to illegal pretrial punishment. In late November 2010, just prior to the emails chronicled above, someone from the Government (i.e. the prosecution team) contacted the Brig and said the following:

> Defense has made a request that PFC Manning's status be reduced from POI to some other status where he is able to have more time outside or workout in his cell. My understanding is that his status determination is made based upon a list of factors including his charges, mental health and behavior. Since the Defense has made this request to lower his status *it is something that we have to at least address*. Is there a lesser level of POI that PFC Manning could be moved to. If the *recommendation of the Brig personnel is to have him remain on POI that is fine*, we just need to have it addressed to the Defense counsel. (emphasis added).

See Attachment 35.

71. Thus, it appears that the Government did not actually try to have PFC Manning removed from POI status ("If the recommendation of the Brig personnel is to have him remain on POI that is fine"), but simply made inquiries of the Brig to "at least address" the concerns raised by the Defense. *Id.*

72. During this time, the Government also requested copies of sunshine logs maintained by the Brig:

> The defense counsel is concerned about PFC Manning's mental and physical health in relation to his small amount of time outside. In order to combat any potential Article 13 issues I would like to get a copy of the logs that show when PFC Manning went outside and how long he stayed there. I know that he usually gets 20 minutes daily but I need to have the logs to show that.

Id. Far from trying to remedy the situation, the Government was just looking for documentation that could be used to "combat any potential Article 13 issues." *Id.*

73. All of the Defense's requests for a change in confinement conditions were met with assurances that the confinement conditions were being reviewed and would be adjusted in time. However, despite these assurances, PFC Manning remained in MAX and POI at Quantico for

over eight months. When combined with the time he spent on Suicide Risk in Kuwait, PFC Manning was in the equivalent of solitary confinement for almost eleven months.

74. On 5 January 2011, PFC Manning filed a complaint with the Quantico Brig Commander and a DD Form 510 complaint through the Brig's grievance process. *See* Attachments 10, 36. The complaint and the official grievance requested that the Brig commander remove PFC Manning from MAX and POI or provide justification for his decision to keep PFC Manning in MAX and POI. PFC Manning was not provided with any form of redress through the grievance process.

75. On 13 January 2011, PFC Manning filed a request for release from pretrial confinement under R.C.M. 305(g). *See* Attachment 11. PFC Manning cited the unduly harsh confinement conditions, the Quantico Brig commander's failure to respond to his grievance request, and the failure of the military magistrate to seriously consider other options under R.C.M. 304 to ensure PFC Manning's presence at trial. COL Carl R. Coffman Jr., the Special Court-Martial Convening Authority (SPCMCA), subsequently denied PFC Manning's request and informed PFC Manning that he would address the POI issue in a separate action. *See* Attachment 12. COL Coffman did not address the POI issue raised by PFC Manning.

76. On 19 January 2011, PFC Manning filed a request for redress under Article 138, UCMJ with the Quantico Base Commander, Col. Choike. *See* Attachment 13. The Quantico Brig Commander, CWO4 Averhart, filed a response to PFC Manning's Article 138 Complaint on 24 January 2011. *See* Attachment 15. So too did Col. Oltman. *See* Attachment 17. On 1 March 2011, Col. Choike filed a response to PFC Manning's Article 138 Complaint. *See* Attachment 18. This response was served on PFC Manning on 2 March 2011. All three determined that no relief was appropriate and denied PFC Manning's request for redress.

77. On 10 March, 2011, PFC Manning filed a Rebuttal to Col. Choike's denial of his Article 138 Complaint. *See* Attachment 14. In this, PFC Manning also raised the incident on 2 March 2011 where he was placed on Suicide Risk. CWO4 Averhart and CWO2 Barnes filed responses where they recommended denying PFC Manning's petition for redress. *See* Attachments 16, 20, 21. Col. Choike denied PFC Manning's Article 138 Complaint a second time on 8 April 2011. *See* Attachment 19. Two days prior, on 6 April 2011, Col. Choike determined that he would not consider the new matter raised by PFC Manning's Article 138 Complaint. On 10 April, PFC Manning filed a second rebuttal to Col. Choike's response and requested that he consider the new matters raised in the Article 138 Complaint. *See* Attachment 19.

78. All of these matters were forwarded to the Secretary of the Navy for his final action. On 13 June 2011, Juan Garcia, Assistant Secretary of the Navy, took final action on the Article 138 Complaint by denying PFC Manning's request for redress. *See* Attachment 23. He stated "even if your complaint has merit, your transfer to [Fort Leavenworth] is a superseding and intervening event that has made your request for relief unavailable." *Id.*

79. On 20 April 2011, PFC Manning was transferred to the Joint Regional Correctional Facility (JRCF) at Fort Leavenworth, Kansas. After a routine indoctrination period, PFC Manning was

placed in Medium Custody with no prevention of injury restrictions. He has been held in that status for the past 15 months.

ARGUMENT

80. Article 13 provides that "no person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement upon the charges be any more rigorous than the circumstances required to insure his presence." Article 13 thus prohibits both: (1) the imposition of punishment or penalty prior to trial; and (2) confinement conditions more rigorous than necessary to ensure the accused's presence at trial. *See United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006); *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003); *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000). If an accused can demonstrate an intent to punish or the imposition of unduly onerous confinement conditions, he is entitled to relief under Article 13. *See id.*

81. The first prohibition of Article 13 requires an accused to show an intent to punish. *See United States v. Huffman,* 40 M.J. 225, 227 (C.M.A. 1994). This intent can be determined by examining the intent of the detention officials, or by examining the purposes served by the conditions of confinement. *See United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). "Absent a showing of an expressed intent to punish on the part detention facility officials, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Bell v. Wolfish,* 441 U.S. 520, 538 (1979).

82. On the other hand, the second prong of Article 13 focuses on the conditions endured by the accused, and whether they are more rigorous than necessary to guarantee the accused's presence at trial. *See United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). Conditions that are sufficient egregious may give rise to a permissible inference that an accused is being punished, or the conditions may be so excessive as to constitute punishment. *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011).

83. In this case, there is a clearly expressed intention to punish PFC Manning. Col. Oltman had decided that PFC Manning would remain in MAX and POI for as long as he was at Quantico because nothing was going to happen "on his watch." Even if there weren't such a clearly expressed intention to punish PFC Manning, the restrictions that were placed on PFC Manning were not related (much less rationally related) to any legitimate government objective. Finally, the egregious conditions of PFC Manning's confinement for over eight months permit the *per se* inference that PFC Manning was punished in contravention of his constitutional rights.

A. Quantico Brig Officials Intended to Punish PFC Manning

84. There is clear evidence showing that the conditions imposed on PFC Manning were motivated by factors which had nothing to do with PFC Manning's risk of self-harm, harm to others, or potential flight risk. In particular, the Brig's arbitrary policy to keep PFC Manning

subject to the harshest conditions possible shows an intent to punish PFC Manning. *See United States v. Crawford*, 62 M.J. 411, 416 (C.A.A.F. 2006)("we do [not] condone arbitrary policies imposing 'maximum custody' upon pretrial prisoners. We will scrutinize closely any claim that maximum custody was imposed solely because of the charges rather than as a result of a reasonable evaluation of all the facts and circumstances of a case.").

a) Col. Robert Oltman's Order That PFC Manning Would be Kept on MAX and POI Indefinitely

85. The confinement conditions imposed on PFC Manning at Quantico were motivated by a desire to punish PFC Manning for the crimes he is alleged to have committed; the media scrutiny that his case has generated; and the comments that PFC Manning made in attempting to have the restrictive confinement conditions lifted.

86. PFC Manning is alleged to have leaked hundreds of thousands of classified documents to WikiLeaks. He has been denounced as a traitor in the media. Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, indicated that PFC Manning "might already have blood on his hands." Members of Congress have called for PFC Manning's execution. PFC Manning has been charged with "aiding the enemy," a charge that is closely related to treason.

87. In response to the high-profile nature of this case, and the apparent predetermination by Brig officials that PFC Manning is guilty, Col. Oltman issued a directive reminiscent of "A Few Good Men"[7] that PFC Manning would be held under MAX and POI because nothing was going to

[7] In an infamous scene from the movie "A Few Good Men," Col. Jessup (played by Jack Nicholson) unapologetically boasts that he ordered a "Code Red":

> Judge Randolph: *Consider yourself in Contempt!*
> Kaffee: *Colonel Jessep, did you order the Code Red?*
> Judge Randolph: You *don't* have to answer that question!
> Col. Jessep: I'll answer the question!
> [*to Kaffee*]
> Col. Jessep: You want answers?
> Kaffee: I think I'm entitled to.
> Col. Jessep: *You want answers?*
> Kaffee: *I want the truth!*
> Col. Jessep: *You can't handle the truth!*
> [*pauses*]
> Col. Jessep: Son, we live in a world that has walls, and those walls have to be guarded by men with guns. Who's gonna do it? You? You, Lt. Weinburg? I have a greater responsibility than you could possibly fathom. You weep for Santiago, and you curse the Marines. You have that luxury. You have the luxury of not knowing what I know. That Santiago's death, while tragic, probably saved lives. And my existence, while grotesque and incomprehensible to you, saves lives. You don't want the truth because deep down in places you don't talk about at parties, you want me on that wall, you need me on that wall. We use words like honor, code, loyalty. We use these words as the backbone of a life spent defending something. You use them as a punchline. I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very freedom that I provide, and then questions the manner in which I provide it. I would rather you just said thank you, and went on your way. Otherwise, I suggest you pick up a weapon, and stand a post. Either way, I don't

happen "on [his] watch." When challenged by Capt. Hocter, Col. Oltman responded that "nothing's going to change. He won't be able to hurt himself and he won't be able to get away, and our way of making sure of this is that he will remain on this status indefinitely." Capt. Hocter said something to the effect of, "Sir, I am concerned because if you're going to do that, maybe you might want to call it something else, because it's not based on anything from behavioral health." In response, Col. Oltman said, "We'll do whatever we want to do. You [the Brig psychiatrists] make your recommendation and I have to make a decision based on everything else." Capt. Hocter responded, "Then don't say it's based on mental health. You can say it's MAX custody, but just don't say that we're somehow involved in this." Col. Oltman said, "That's what we're going to do."

88. The very next day, on 14 January 2011, Capt. Hocter evaluated PFC Manning and found (as he had for the previous five months) that he did not require POI restrictions. The tone of this evaluation was different than the others and he appears to reference to Col. Oltman's order from the day before. Capt. Hocter writes:

> Pt [patient] continues to not be suicidal and does not require POI. Please remove him. If he requires enhanced security for other reasons, please consider writing a separate SOP.

See Attachment 2.

89. It was clear to those at the 13 January 2011 meeting that the directive from Col. Oltman was coming from "higher up." *See* Attachment 8 ("He indicated that Manning would remain in current status (POI) unless and until he received instructions from higher authority (unnamed). I do not recall him saying he would be kept that way until his legal process was complete, but the impression he left was not to expect any changes in the near future."; "The Security Battalion Commander intimated that he was receiving instructions from a higher authority on the matter but did not say from whom.").

90. Although the meeting took place in January of 2011, it is safe to assume that the order that PFC Manning would remain in MAX and POI had been in place since PFC Manning arrived at Quantico. This was just the first time that the Brig psychiatrists (and later, the Defense) learned what was really going on.

91. The decision early on to hold PFC Manning under these onerous conditions – with no hope for improvement – was clearly based on the desire to punish PFC Manning for the crimes that he was alleged to have committed. An official's expressed desire to punish constitutes unconstitutional punishment. *See Bell v. Wolfish,* 441 U.S. 520 (1979); *See also United States v.*

---

give a damn what you think you are entitled to.
Kaffee: Did you order the Code Red?
Col. Jessep: I did the job I...
Kaffee: *Did you order the Code Red?*
Col. Jessep: *You're Goddamn right I did!*

Fricke, 53 M.J. 149, 155 (C.A.A.F. 2000)(accused alleged that he was placed in solitary confinement for an extended period of time because prison officials were attempting to "break him"; court indicated that "coercing a confession is not a legitimate governmental objective.").

92. Moreover, where a result is already pre-determined, by definition, procedural due process is denied. *See Ryan v. Ill. Dep't of Children & Family Servs.,* 185 F.3d 751, 762 (7th Cir. 1999) (producing "evidence that the decision has already been made and any hearing would be a sham" sets forth a procedural due process claim); *Patrick v. Miller*, 953 F.2d 1240, 1245 (10th Cir. 1992) (holding that due process requires an impartial tribunal that has not predetermined facts); *Francis v. Coughlin*, 891 F.2d 43, 46 (2nd Cir. 1989) ("[I]t is axiomatic that a prison disciplinary hearing in which the result is arbitrarily and adversely predetermined violates [the right of due process].").

93. In *United States ex. rel. Accardi v. Shaughnessy*, 74 S.Ct. 499 (1954), the Supreme Court found a violation of procedural due process in circumstances far less glaring than the instant case. In *Shaughnessy*, the petitioner brought a habeas action in which he attacked the validity of the denial of his application for suspension of deportation. He alleged that he was "prejudged" because prior to the immigration board's hearing, the Attorney General published a confidential list of "unsavory characters." *Id.* at 500. The Supreme Court found that the petitioner's procedural due process rights were violated because the "issuance of the list and related publicity amounted to public prejudgment by the Attorney General so that fair consideration of the petitioner's case by the Board of Immigration Appeals was made impossible." *Id.* at 502. Notably, the Supreme Court stated, "To be sure, the petition does not allege that 'the Attorney General ordered the Board to deny discretionary relief to the listed aliens.' It would be naïve to expect such a heavy handed way of doing things." *Id.* at 503. And, yet, this "heavy handed way of doing things" is exactly how Col. Oltman handled the determination of the conditions of PFC Manning's confinement. If a not-so-subtle "hint" at the result sought constitutes a violation of due process as the Supreme Court held in *Shaughnessy*, then surely an explicit order by the Security Battalion Commander to keep PFC Manning under MAX and POI amounts to violation of PFC Manning's constitutional rights.

94. Col. Oltman's unlawful order that PFC Manning be maintained in MAX and POI status was made even more egregious by the fact that it was made in the presence of a JAG officer, thus giving it a legal "blessing." That a JAG officer stood by mutely while a commander issued an order which clearly violated an accused's constitutional rights cannot be countenanced. It is a particularly sad day when the guardians of the system are the ones failing it.

95. On 31 January 2011, just a few weeks after the meeting where Col. Oltman directed that PFC Manning would not be removed from MAX or POI because "nothing was going to happen on [his] watch," Col. Oltman recommended that PFC Manning's Article 138 Complaint be denied. *See* Attachment 17. Col. Oltman stated that CWO4 Averhart's "classification and assignment decisions in this case have been appropriate and within applicable regulations." *Id.* Of course, Col. Oltman thought these recommendations were "appropriate." *Id.* After all, Col. Oltman was the one who issued the order to make those recommendations in the first place.

b) Col. Oltman's Order Provides Context for the Repeated Recommendations of the C&A Board and the PCF Commander to Retain PFC Manning in MAX and in POI Over the Recommendations of Brig Psychiatrists

96. When viewed against the backdrop of Col. Oltman's order, the continued recommendations of the C&A Board and of CWO4 Averhart and CWO2 Barnes to retain PFC Manning on MAX and POI now make sense. *See* Attachment 6. In his Response to PFC Manning's Article 138 Complaint, Col. Choike writes:

> In your case, the PCF mental health provider recommended removal of POI status near the end of August. Except for one week in December, the PCF mental health provider has consistently recommended that you be removed from POI. However, the C&A Board has consistently recommended that you remain in POI status given your intake document that you were 'always planning' suicide. It is within the direction of the PCF Commander to retain you in a POI status. I note that the PCF Commander has the inherent authority over those in his custody to maintain order and discipline and the responsibility to ensure safety and security in the PCF.

See Attachment 18.

97. The C&A Board, along with CWO4 Averhart and CWO2 Barnes, had been told what they needed to do – keep PFC Manning subjected to the most rigorous conditions possible. So no matter what the psychiatrists recommended, week-after-week, month-after-month, nothing ever changed because everyone at the Brig had their marching orders from Col. Oltman, who in turn had his marching orders from someone higher up in the chain of command. In effect, the psychiatric opinions were just "window dressing" to make it look like PFC Manning was accorded due process – when it was abundantly clear that he was not.

98. A careful look at the C&A Board reviews shows that the entire "process" was just a sham.[8] First, the C&A Board failed to fill out the appropriate forms for a total of *five* months. *See* Attachment 6. *See also* Attachment 19 (Col. Choike acknowledging that "not each decision was documented utilizing the local generated 'Form 4200'."). It was only when it was clear that Quantico was being subjected to outside scrutiny that the Board thought it necessary to create a paper trail to make it appear like PFC Manning was being accorded due process. The failure to document the continued decision to maintain PFC Manning in MAX and POI is reflective of the fact that the "decision" was already predetermined. *See McClary v. Kelly,* 4 F.Supp. 2d 195, 213 (W.D.N.Y. 1998)("Due process is not satisfied where the periodic reviews are a sham."); *Sourbeer v. Robinson,* 791 F.2d 1094 (1101 (3d Cir. 1986)(while "the monthly review

[8] CWO4 Averhart notes that the weekly C&A Board evaluations have "unanimously" recommended retaining PFC Manning in MAX and POI. *See* Attachment 15. If a process were actually neutral (i.e. not already predetermined), one would have expected to see *some* disagreement in the three dozen times the Board convened. The only thing that can explain the unanimity is that everyone was sold exactly how they had to vote.

procedures ... were facially adequate" the prisoner's due process rights were violated because the reviews were merely "perfunctory.").

99. Further evidence of the fact that the result was predetermined is found in the reviews from 3 January 2011 until the time that PFC Manning was transferred to the JRCF. For instance, week after week, the following boxes were generally ticked as supporting the continued decision to retain PFC Manning in MAX and on POI: low tolerance of frustration; poor home conditions or family relationships; length, or potential length, of sentence. *Id.* Notably, "poor home conditions or family relationships" and "length, or potential length, of sentence" are immutable factors. That is, there is nothing PFC Manning could ever do to change the fact that he might have had poor home conditions and was facing a lengthy sentence.

100. Further, the decision to continually check the "low tolerance of frustration" box is oftentimes in direct contravention of the mental health providers' determination that PFC Manning had "an average tolerance of frustration/stress" (note: there is no option of ticking that an inmate has a "good tolerance of frustration/stress"). For instance, on 30 December 2010, Capt. Hocter indicated that "inmate has an average tolerance of frustration/stress." *See* Attachment 2. In the next C&A Board review four days later, on 3 January 2011, CWO4 Averhart ticked the box indicating that PFC Manning has "low tolerance of frustration." *See* Attachment 6. Thus, it appears that the Brig has made the decision that despite what the doctors say, *in their personal view*, PFC Manning had a "low tolerance of frustration." Consequently, there was absolutely nothing that PFC Manning could do with respect to the factors that the Brig continually used to justify the MAX and POI status.

101. After the 18 January 2012 incident where PFC Manning had an anxiety attack, the C&A Board realized that it could tick yet another box to bolster its already predetermined conclusion – "assaultive/disruptive behavior." The C&A Board, however, didn't realize that right away. So in the 21 January 2011 review, CWO4 Averhart ticked the usual three: "low tolerance of frustration", "poor home conditions" and "length, or potential length, of sentence." *See* Attachment 6. By 28 January 2011, CWO2 Barnes added "assaultive/disruptive behavior" and kept it on the list for the next month. *Id.* It is unclear how PFC Manning's anxiety attack, prompted by harassment by Brig guards, can properly be regarded as either "assaultive" or "disruptive."

102. On the 28 January 2011 C&A Board review form, CWO2 Barnes checked the box that read: "A mental evaluation indicating serious neurosis or psychosis." *Id.* There was *never* any mental evaluation during this period indicating "serious neurosis or psychosis." That exact same day, 28 January 2011, COL Malone recommended removing PFC Manning from POI, indicating that "inmate does not pose a threat to himself" and "inmate does not need to be segregated from general population." *See* Attachment 9. In the Medical Officer's Remarks, COL Malone indicates that "[PFC Manning] requires routine outpatient follow-up." *Id.* This hardly constitutes an "evaluation indicating serious neurosis or psychosis" as CWO2 Barnes had indicated on the C&A Board review form. CWO2 Barnes also checked the same box the following week, despite a notation that psychiatrists "recommend to be placed off POI." *Id.*

Thus, it appears that the C&A Board was taking great liberties with the grounds it was using to keep PFC Manning on MAX and on POI and ticking boxes willy-nilly with no regard for whether they were actually true.

103. On 18 February 2011, the C&A Board added a box labeled "potential mental disorders." *See* Attachment 6. This seems to also have been made up out of whole cloth, as the psychiatric review conducted that same day stated, "Mental disorder is resolved" and the recommendation was that PFC Manning "does not need to be segregated from general population due to a treatable mental disorder." *See* Attachment 2. How could the Brig use "potential mental disorders" to justify PFC Manning's continued classification decision when Brig psychiatrists came to the directly opposite conclusion (i.e. that any "mental disorder is resolved")? Again, this shows the C&A Board arrogantly placing its armchair psychiatry above the opinions of qualified mental health providers.

104. In the "Remarks" section of the C&A Board reviews, the following comment appears in some variation in *every entry*, oftentimes verbatim:

> SND has previous demonstrated suicidal ideations and gestures. SND was transferred from TFCF Camp Arifjan due to the lack of specialized mental health care. SND has demonstrated erratic behavior as recently as [date]. SND has a potential gender identity disorder and is pending a 706 sanity board hearing.

See Attachment 6. Apparently, the C&A Board felt it appropriate to cut-and-paste the exact same thing over and over again for four months in order to justify the determination to keep PFC Manning in MAX and POI. This cut-and-paste job does not bear the hallmarks of a neutral, considered C&A Board process.

105. Moreover, there was absolutely nothing PFC Manning could have done to change any of the cited reasons for keeping him in MAX and on POI. PFC Manning apparently had demonstrated suicidal ideations when held in Kuwait; he was pending a 706 Board; he did have a potential gender identity disorder; and Brig officials always found something they considered erratic about his behavior. After PFC Manning's anxiety attack on 18 January 2011, the following notation began to appear in subsequent C&A reports, "On 18 January, SND had an anxiety attack and began acting aggressively toward himself in the presence of the Brig OIC and Supervisor." *Id.* The notation appeared up until 3 March 2011. *Id.* Again, there was nothing PFC Manning could do about any of these notations that continued to form the basis to hold him in the functional equivalent of solitary confinement.

106. There is also a strange, but telling, annotation on 18 February 2011. In typewritten font, in the "Remarks" section, the C&A Board states, "Due to the nature of SND's charges and national security concerns, SND is potentially facing a severe sentence to confinement." Someone, in handwriting, inserted the word "alleged" between "SND's" and "charges." *Id.* What is clear is that the Brig was trying to avoid the appearance that it was punishing PFC Manning based on the

nature of the charges against him, hence the word "alleged" (even though it did not fit into the sentence).

107. By the end of PFC Manning's time at Quantico, the C&A reviews reflect the fact that PFC Manning had withdrawn from the C&A process and was being guarded with staff. That, in turn, was used against him as a basis upon which to continue his POI and MAX status. On 18 March 2011 (after PFC Manning was subjected to additional restrictions owing to his comment about his underwear), the C&A Board noted "SND's demeanor has become secluded [sic] from the majority of the Brig staff and previous visitors." *Id.* It also noted "SND has recently begun to isolate himself, showing limited interest in conversation with staff or his counselor ..." *Id.* On 25 March 2011, there is the exact same entry: "SND has recently begun to isolate himself, showing limited interest in conversation with staff or his counselor ..." *Id.* On 1 April, the C&A Board repeats once again, "SND continues to isolate himself, showing limited interest in conversation with staff or his counselor ..." *Id.* On 8 April, not surprisingly, the exact same entry appears: "SND continues to isolate himself, showing limited interest in conversation with staff or his counselor ..." *Id.*

108. Incredulously, at least two of the entries towards the end of PFC Manning's confinement at Quantico suggest that there is actually something PFC Manning could do to have the onerous conditions of his confinement removed. On 1 April 2011, CWO2 Barnes writes, "SND's mood has been somber. There is no detailed conversations as in the past. No lite contact. Lately, has not requested any special accommodations; has not been appearing in front of the C&A Board to give input to make a difference." *Id.* CWO2 Barnes actually had the audacity to suggest that if PFC Manning were to appear before the C&A Board, it would "make a difference." Based on the entries in the C&A reviews (which were, of course, done at the behest of Col. Oltman), it is clear that there was nothing PFC Manning could ever do to change the circumstances of his confinement. In fact, when PFC Manning did appear before the C&A Board on 25 February 2011, the Board wrote "SND requested to appear infront [sic] of the classification and assignment board, but had no new issues to bring to the board's attention, that were not already voiced in his previous appearances before the board." *Id.* Thus, it is clear that when PFC Manning did appear before the C&A Board, it wholly discounted what he had to say.

109. Moreover, the Board's comment that "[PFC Manning] had no new issues to bring to the board's attention that were not already voiced in his previous appearances before the board" is wholly absurd. At the time of the review in question, PFC Manning had been in the functional equivalent of solitary confinement for eight months – what "new issues" could PFC Manning have possibly raised? That is, what "new" reason could PFC Manning have provided to the Board that would have made the Board members think, "Thanks for bringing that up. Maybe we should lessen your confinement restrictions."? It is ridiculous to think that the Brig would bait PFC Manning into participating in the process (by suggesting that there was something he could do or say to change the conditions of his confinement) but then dismiss his participation in the process because he didn't say anything "new."

110. On 15 April 2011, CWO2 Barnes writes in the C&A Board notes, "SND remains guarded. Spoke to SND on 20110411 regarding being more open and engaging in communication in efforts to adjust handling but no change has been seen. SND has not spoken to me about coming off POI although I explained what he needs to do." *Id.* Again, it is unbelievable that Quantico Brig officials would suggest that there was something that "he needs to do" to get off of POI status. If eight months of repeated recommendations from Brig psychiatrists, coupled with pleas from PFC Manning, his lawyer and the community at large, did not result of a lessening of restrictions, nothing ever would. It is abundantly clear that if PFC Manning had not been transferred to the JRCF, he would still be in MAX and on POI at Quantico today, stripping naked every night, wearing a suicide smock, sleeping on suicide bedding, and covering himself with a suicide blanket.

111. It is also clear from looking at the C&A Board notes that no weight was accorded to the psychiatrists' recommendations to remove PFC Manning from POI. Sometimes, the entries would annotate a sentence or two from the psychiatrists' recommendations, but would make absolutely no effort to explain why the recommendation was overridden. For instance, on 25 February 2011, the Remarks section reads:

> SND has previous demonstrated suicidal ideations and gestures. SND does not have strong family ties, and or relationships with immediate family. SND requested to appear infront [sic] of the classification and assignment board, but had no new issues to bring to the board's attention, that were not already voiced in his previous appearances before the board. SND was evaluated by Col Malone on 20110225. Col Malone annotated the SND's behavior and thought content is normal and his thinking process is clear. Col Malone annotated that SND does not need to be segregated from general population due to a treatable mental disorder and that SND would only need routine examinations in the future. Col Malone stated that SND remains in early remission of an anxiety disorder. Col Malone is also tapering SND off of his prescribed medications. Due to the nature of SND's alleged charges and national security concerns, SND is potentially facing a severe sentence to confinement.

Id. The "Remarks" section is a complete non-sequitur, with a bunch of random facts and no justification for the decision to retain PFC Manning in POI and MAX. The Brig makes no attempt to explain why the opinion of COL Malone is outright ignored.

112. The C&A Board reviews are not the only evidence that the psychiatrists' opinions meant nothing to the Brig given the order by Col. Oltman that PFC Manning would not be removed from MAX and POI. In PFC Manning's conversation with MSGT Papakie following the first incident where PFC Manning was placed on Suicide Risk, it is obvious that Brig officials would never be swayed by the opinions of pesky mental health providers. The conversation between the two went as follows, with MSGT Papakie speaking in a loud and booming voice:

> PFC Manning: Why was I on, why was I on prevention of status for almost 6 months?
>
> MSGT Papakie: [chuckles to himself] I know this is no secret to you ... I have plenty of documentation. Plenty of documentation based on things that you've said, things that you've done. Actions – I have to make sure, we have to make sure, that you're taken care of.
>
> PFC Manning: Yes, MSGT.
>
> MSGT Papakie: Things that you've said and things that you've done don't steer us on the side of "ok, well, he can just be a normal detainee." They make us stay on the side of caution.
>
> PFC Manning: But what about recommendations by the psychiatrist to remove me off the status?
>
> MSGT Papakie: Who's here every day? Who's here every day? We are. Who sees you every day? That's all he is, is a recommendation. We have, by law, rules and regulations set forth to make sure from a jail standpoint that Bradley Manning does not hurt himself. Maybe from a psychiatric standpoint, the recommendation he's given – I get it, I got it, understand, OK? But he's not the only decision maker. A mental health specialist is not the only decision that gets made.

See Attachment 25. MSGT Papakie also repeated on 2 March 2011 that there was nothing PFC Manning could ever do to remove himself from POI, despite the recommendations of mental health providers.

113. Col. Choike also discounted the medical health providers' recommendations. He stated that POI status is assigned to those "prisoners who have given an indication that they intend or are contemplating harming themselves. This status is not linked to a medical officer's approval." *See* Attachment 18. He also stated, "A mental health provider does not need to authorize administrative segregation to prevent self-injury provided the segregation is not being done to circumvent a medial professional's opinion that suicide risk is not necessary."[9] *See* Attachment 19.

114. It is clear from the C&A Board notes, Col. Choike's statements, and MSGT Papakie's comments that the repeated recommendations of the psychiatrists meant *absolutely nothing* to Quantico Brig officials. After all, they all knew what had to be done – follow Col. Oltman's order and maintain the status quo at all costs.

[9] Col. Choike deliberately avoids the million dollar question: If you are going to ignore the repeated recommendations of psychiatrists for nine months, why bother having their input at all?

115. Capt. Moore, the psychiatrist who was originally a Brig psychiatrist and later appointed to the Defense team, expressed extreme frustration about the "bizarre" circumstances at Quantico:

> The way that they're treating this is so … it's just bizarre all the way around. I'm just surprised that they would become so intrusive because I'd be concerned about what that looks like later on. And they've not seemed to have any qualms at all about reaching down so heavy handed. And when I've asked … and again, there's no documentation – I just have people, either the guards or the corps man or anyone else telling me, "Why in the world is this going on?"
>
> …
>
> And when I tried to talk to Capt. Lewis, she basically said, "All I know is that I don't want to be involved in this!" And she just came back from working with Guantanamo Bay, and so she has a lot of her concerns about, "What are you guys doing with this? How is this consultant helping you with Manning? I mean, what are they doing?" And I don't know either. It's not an interrogation, I don't think. He's not been adjudicated, so there's a lot of risk to putting too many services out there when somebody is in this pretrial situation. I don't know. I don't know. It's bizarre. I look at is like if there's a child sex abuse person who has an accusation – you don't now bring in some psychologist or something to figure out how we're going to manage this person. Because you don't know. They're supposed to be assumed innocent. What you're supposed to be doing is protecting where they're not incriminating themselves. So, I don't know. It's been a bizarre thing … I've never seen anything like it.
>
> …
>
> [PFC Manning] comes from such a chaotic, neglected background to begin with. In some ways, it's just the latest form of what he's had to endure. It's just sad. It seems like all the protections you would ever have for somebody that's accused – he's not even convicted of anything. He doesn't have any rights at all. It's just … I don't know. I try to get the emotions out of it because it's so frustrating to me.

Oral Statement by Capt. Moore to Mr. Coombs.

116. Those "bizarre" circumstances that Capt. Moore refers to – circumstances that the Defense submits clearly amount to pretrial punishment – can in fact be understood when placed against the backdrop of somebody deciding very early on that PFC Manning would never be removed from MAX and POI so long as he was at Quantico.

c) <u>The Entire Article 138 Process Was Tainted By Col. Oltman's Order</u>

117. It is clear that CWO4 Averhart was at the meeting where Col. Oltman issued his order to keep PFC Manning on MAX and on POI indefinitely. Accordingly, CWO4 Averhart's justification of his actions and decision to retain PFC Manning in these conditions must be viewed in light of the fact that he was ordered to do so. In short, CWO4 Averhart's submissions in Attachment 15 and 16 are tainted by his role in effectuating Col. Oltman's order.

118. CWO4 Averhart paints a picture where he balanced competing interests and, using his discretion as the Brig OIC, determined that MAX and POI was the appropriate classification for PFC Manning. He states that "at all times, my decisions have been guided by recommendations from the Brig staff, the C&A Board, and mental health providers and also through interactions with PFC Manning." *See* Attachment 15. This could not be further from the truth. CWO4 Averhart's decisions were based on marching orders from Col. Oltman that PFC Manning would be held in MAX and POI indefinitely.

119. Because CWO4 Averhart's responses to PFC Manning's Article 138 Complaint were relied on by Col. Choike in denying redress, the whole process was corrupted from the start. PFC Manning thus never stood a chance of getting relief from the conditions of confinement at Quantico because those with the keys to relieving him of these conditions were part of the process that created those conditions to begin with.

d) The Incident on 18 January 2011 was Retribution for the Protest Outside Quantico the Previous Day

120. The conversation between MSGT Papakie and PFC Manning, discussed above, stemmed from the incident on 18 January 2011 where CWO4 Averhart decided to put PFC Manning on Suicide Risk status after PFC Manning had an anxiety attack at recreation call. The Defense submits that Brig guards provoked the anxiety attack because they were angry about a protest that took place the day before outside the gates of Quantico that was designed to bring attention to the conditions of PFC Manning's confinement. On a video filmed by one of the protestors, Quantico guards can be heard saying, "Quit asking questions! Quit asking questions!" and "You're not helping out, man, you're not helping out."[10]

121. On 18 January 2011, Brig guards were agitated and confrontational with PFC Manning. Instead of the usual two to three guards, there were four guards assigned to PFC Manning. They immediately began issuing conflicting orders, and were insistent that PFC Manning use the expression "aye, sir" rather than "yes, sir." The harassment continued when the guards escorted PFC Manning into the recreation hall. Due to the belligerence of the guards and being yelled at, PFC Manning began to feel faint and dizzy. He took a step away from the guards, as they got ready to restrain him. PFC Manning immediately put his hands in the air and said, "I'm not doing anything, I am just trying to follow your orders." In GM2 Webb's account of the events,

[10] See http://www.youtube.com/watch?v=x4eNzokgRIw.

he states that after the incident, and while still at recreation call, "[PFC Manning] stated he didn't understand why he was being treated different and that it seemed that all the guards were anxious and it was making him anxious." *See* Attachment 24. Not surprisingly, Brig guards reported the incident that they, themselves, had created. *See* Attachment 3, SECNAVINST 1640.9C, Section 4401(3)(warning that "arbitrary actions [by Brig officials] may precipitate a disturbance.").

122. Later that day, about 30 minutes after he had been returned to his cell, the PCF Commander, CWO4 Averhart, visited PFC Manning in his cell. When PFC Manning tried to explain what happened earlier that day during the recreation call and expressed continued frustration over the conditions of his confinement, CWO4 Averhart stopped PFC Manning and said, "I am the commander" and "No one will tell me what to do." He also stated to PFC Manning that he was, for all practical purposes "God." PFC Manning responded by saying that CWO4 Averhart still had to follow Brig procedures and that everyone has a boss they have to answer to. When PFC Manning made these comments, CWO4 Averhart placed PFC Manning on Suicide Risk status.[11]

123. The facts permit the logical inference that PFC Manning's harassment at the hands of the guards on 18 January 2011 was in response to the protests outside Quantico the previous day. When the guards' harassment resulted in PFC Manning being overcome with anxiety, CWO4 Averhart used this as a pre-textual justification for placing PFC Manning on Suicide Risk. Moreover, the timing of the Suicide Risk order (i.e. after PFC Manning had made comments challenging CWO4 Averhart's authority) strongly suggests that the Suicide Risk designation was retributive in nature. Two separate Brig psychiatrists expressly disapproved of the Suicide Risk designation by CWO4 Averhart. Under the Navy's own rules, "When prisoners are no longer considered to be suicide risks by a medical officer, they shall be returned to appropriate quarters." PFC Manning was not removed from Suicide Risk until 20 January 2011 in violation of Navy Regulations. *See* Attachment 3; *See also* Attachment 22 ("It warrants mentioning, however, that on two occasions, 6 August 2010 and 18 January 2011, a medical officer determined that suicide risk status was no longer warranted and the brig staff did not immediately take PFC Manning off suicide risk status. ... Paragraph 4205.5b of reference (a) states "When prisoners are no longer consider to be suicide risks by a medical officer, they shall be returned to appropriate quarters," in these cases, once the medical officer's evaluation was provided to the brig staff, steps should have been taken to immediately remove him from suicide risk, to a status below that.").

124. Where Brig officials fail to follow their own rules, this provides evidence of an intent to punish. *See U.S. v. Washington*, 42 M.J. 547, 562 (A. F. Ct. Crim. App. 1995)("if orders or other action independently violate law or regulation, that may be a reason to infer a punitive intent or reject an asserted nonpunitive objective."). The circumstances surrounding this incident lead to a singular conclusion: that PFC Manning was punished for a protest beyond his control and for

[11] CW04 Averhart denies that this conversation took place. As evidence that the conversation did not take place, he states, "had he spoken to me in that manner, I would have made a discipline report on him for insubordination and staff harassment." *See* Attachment 14. It is ironic that CW04 Averhart admits that had PFC Manning insisted that CW04 Averhart follow Brig rules, the result would have been a disciplinary infraction.

insisting that Brig officials follow their own procedures. *See Magluta v. Samples*, 375 F. 3d 1269, 1274 (11th Cir. 2004)(vacating the judgment of the district court where the court failed to take into account plaintiff's allegations that the more the plaintiff complained to prison and jail officials about his treatment, the more he was treated in a severe manner).

e) The 2 March 2011 Decision to Strip PFC Manning of His Clothing Was Retaliation for PFC Manning's Questioning of the Conditions of His Confinement

125. Further evidence of retaliatory punishment is found in the 2 March 2011 decision to strip PFC Manning of all his clothing. When PFC Manning was informed that his Article 138 Complaint had been denied, he asked Brig guards what he could do to improve his confinement conditions. When the Brig Operations Supervisor, MSGT Papakie, responded that there was nothing that PFC Manning could do to change the circumstances of his confinement, PFC Manning became upset and frustrated. PFC Manning stated that he was not going to kill himself, and pointed out how ludicrous the whole situation was by stating that if he wanted to kill himself, he could do so with the elastic band of his underwear or his flip-flops. Brig officials used PFC Manning's sarcastic comment as a justification to further worsen the conditions of his confinement. The only logical conclusion to be drawn from the facts is that Brig officials intended to punish PFC Manning for speaking out about the absurdity of the situation. This is particularly so given that Brig mental health officials expressly indicated that PFC Manning's comments were not indicative of an intention to cause self-harm. Rather they were part of the process of PFC Manning's "intellectualization" of the extremely rigorous conditions of his confinement. *See* Attachments 2, 9.

126. Moreover, the degradation and humiliation to which PFC Manning was subjected on the mornings of 3 March 2011 through 7 March 2011 by being forced to stand naked at attention also shows an intent by the Brig to punish PFC Manning for the comments he made on 2 March 2011. Marine spokesperson First Lt. Brian Villiard explained that "Private Manning will also be required to stand outside his cell naked during a morning inspection, after which his clothing will be returned to him." His justification for not allowing PFC Manning to have his clothes for morning inspection was that "detainees are awakened each morning and immediately come out of their cells. Private Manning cannot be given his underwear back before then ... because that would require waking him up ahead of time." *See* http://www.nytimes.com/2011/03/05/world/05manning.html. So the official U.S. Government position is that it is better to force a pretrial detainee to stand naked at attention than wake him up a few minutes earlier to give him back his clothing?

127. There is no conceivable legitimate justification for requiring a detainee to stand naked at attention. Former Secretary of State Spokesperson, P.J. Crowley, who was fired for calling PFC Manning's treatment at Quantico "ridiculous, counterproductive and stupid," spoke specifically about PFC Manning's forced nudity at the hands of Quantico officials. He stated:

> Based on 30 years of government experience, if you have to explain why a guy is standing naked in the middle of a jail cell, you have a policy in need of urgent

> review. The Pentagon was quick to point out that no women were present when he did so, which is completely beside the point.
>
> The issue is a loss of dignity, not modesty.
>
> Our strategic narrative connects our policies to our interests, values and aspirations. While what we do, day in and day out, is broadly consistent with the universal principles we espouse, individual actions can become disconnected. Every once in a while, even a top-notch symphony strikes a discordant note. So it is in this instance.
>
> The Pentagon has said that it is playing the Manning case by the book. The book tells us what actions we can take, but not always what we *should* do. Actions can be legal and still not smart. With the Manning case unfolding in a fishbowl-like environment, going strictly by the book is not good enough. Private Manning's overly restrictive and even petty treatment undermines what is otherwise a strong legal and ethical position.
>
> When the United States leads by example, we are not trying to win a popularity contest. Rather, we are pursuing our long-term strategic interest. The United States cannot expect others to meet international standards if we are seen as falling short. Differences become strategic when magnified through the lens of today's relentless 24/7 global media environment.
>
> So, when I was asked about the "elephant in the room," I said the treatment of Private Manning, while well-intentioned, was "ridiculous" and "counterproductive" and, yes, "stupid".
>
> I stand by what I said. The United States should set the global standard for treatment of its citizens – and then exceed it. It is what the world expects of us. It is what we should expect of ourselves.

See http://www.guardian.co.uk/commentisfree/cifamerica/2011/mar/29/bradley-manning-wikileaks.

128. It is well established that forced nudity is a classic humiliation technique. The only permissible inference is that the Brig intended to punish PFC Manning by subjecting him to humiliating treatment because PFC Manning correctly pointed out the absurdity of his POI status. Brig officials further added insult to injury when they stated publicly that it would be "inappropriate" to discuss the decision to strip PFC Manning and stand naked at attention "because to discuss the details would be a violation of [PFC Manning's] privacy." *See* http://www.nytimes.com/2011/03/05/world/05manning.html. Again, the Government's position is that *speaking about* PFC Manning's forced nudity is the action that violates PFC Manning's privacy? Really? How about the forced nudity itself?

129. Federal courts have found constitutional violations of an accused's constitutional rights in circumstances far less invasive than these. In *Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir.

2004), pretrial detainees challenged the practice of prison staff using webcams to stream live images of pretrial detainees on the internet. The Ninth Circuit Court of Appeals indicated that "having every moment of one's daily activities exposed to general and world-wide scrutiny would anyone uncomfortable ... [The practice] constitutes a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid." *Id.* at 1030-31. Certainly, being required to stand naked at attention for several minutes in full view of guards who happened to be in the vicinity is at least as humiliating as having one's clothed image captured by a webcam. To borrow language from *Demery*, the additional impact on PFC Manning of being forced to stand naked in full view of Brig guards is "greater by several orders of magnitude than the intrusion inherent in incarceration." *Id.* at 1030. The exploitation of PFC Manning in this manner can be seen as nothing short of retributive. *Id.* at 1030-31 (noting that retribution is not a legitimate government objective than can justify adverse conditions of detention for pretrial detainees); *See also* 16C C.J.S. Constitutional Law §1549 ("What might otherwise be a lawful detention becomes an unconstitutional restriction when prison conditions become so dehumanizing as to constitute an additional hardship beyond the need for custody in violation of the detainees' due process rights).

130. Military courts have also found unlawful pretrial punishment in circumstances where the conduct at issue was designed to humiliate an accused. In *United States v. Combs*, 47 M.J. 330, 332 (C.A.A.F. 1997), the Court of Appeal for the Armed Forces emphasized that:

> the courts will not tolerate egregious, intentional misconduct by command where there is no evidence of a legitimate, non-punitive objective for the conduct complained of, the apparent singling out of an accused for personal humiliation, and restrictions on liberty so oppressive as to be more consistent with the status of prisoner.

Similarly, in *United States v. Singleton*, 59 M.J. 618, 625 (Army Ct. Crim. App. 2003), the Army Court of Criminal Appeals stated, "[w]hen commanders and superiors publicly denounce, degrade, or humiliate an accused prior to trial, [this] may constitute unlawful pretrial punishment warranting confinement credit." In *United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001), the Court of Appeals for the Armed Forces indicated that "[p]retrial punishment includes public denunciation and degradation." In that case, the accused (who was pending administrative discharge) was ordered to the front of his unit formation while the detachment commander read the charges against him and read the accused his rights in a loud voice. The military judge, in awarding sentencing credit, indicated that "[t]he actions that occurred in this case are inexcusable, reprehensible, and cannot be condoned by any court." *Id.* at 93. *See also United States v. Villamil–Perez,* 32 M.J. 341, 342–43 (C.M.A. 1991)(supervising officer's posting on workplace bulletin board of a serious incident report, which included Specialist Perez's alleged drug offense and a prior letter of reprimand, was prohibited by Article 13); *United States v. Stamper,* 39 M.J. 1097, 1100 (A.C.M.R. 1994)(finding company commander's remarks to accused in front of others identifying him as a criminal suspect with a propensity to steal constituted pretrial punishment); *United States v. Latta,* 34 M.J. 596, 597 (A.C.M.R. 1992)(granting Article 13 relief where first sergeant sarcastically referred to accused as his

"favorite AWOL case" before unit formation); *United States v. Singleton*, 59 M.J. 618, 625 (Army Ct. Crim. App. 2003)(awarding confinement credit for unlawful pretrial punishment where guards or other persons in authority called the accused, an infantry sergeant, "private"); *United States v. Turner*, 2009 WL 4917899, *2 (N-M. Ct. Crim. App.)(finding illegal pretrial punishment where the circumstances of the accused's appearance in irons before his shipmates could cause court to question whether accused suffered a loss of the presumption of innocence before potential court-martial members).

131. Surely if deliberately calling someone by the wrong rank or discussing the charges against the accused in front of others constitutes humiliating or degrading treatment which military courts will not countenance, so too does requiring an accused to stand naked at attention in full view of others. The fact that this action was later "justified" on the basis that it would have been too difficult to wake PFC Manning up earlier to give him back his clothes and that officials refused to discuss the forced nudity any further because to do so would "violate PFC Manning's privacy" is further illustrative of the general level of absurdity at the Quantico Brig.

f) The Evidence Shows that Quantico Simply Wanted to Protect Itself at the Expense of PFC Manning

132. The evidence further bears out the conclusion that Quantico Brig officials maintained PFC Manning in MAX and on POI for nine months in an effort to protect *themselves* professionally and institutionally at the expense of PFC Manning. On 31 January 2010, a pretrial detainee awaiting court martial at Quantico committed suicide; the detainee was not in MAX or POI.[12] In an effort to ensure that no other prisoner would die "on their watch" (to borrow an expression from Col. Oltman), the Brig simply decided that it would not risk the embarrassment of another suicide and thus placed PFC Manning in MAX and POI with no hope for re-classification.

133. Given the high-profile nature of PFC Manning's case, the Brig simply refused to take any chance (even if infinitesimally small) that it would be publicly embarrassed once again. Indeed, Capt. Hocter references this in his affidavit where he states:

> The Marine Corps, including Quantico, has had a miserable time with the problem of suicide recently. I am certain, from their point of view, the best way to avoid a tragedy is to watch a situation very closely and take action quickly. It has been difficult to help them see that good intentions can have unintended consequences (e.g., making the detainee more anxious and causing occasional agitation).

See Attachment 7. In fact, the concern about embarrassment is so real at the Quantico Brig that a special rule was implemented to deal with it. *See* Attachment 3, SECNAVINST 1640.9C, Section 4401(4)("Serious incidents/alleged incidents that could result in embarrassment to the naval service or focus public attention on the confinement facility in question shall be reported to NAVPERSCOM (PERS-68) or CMC (PSL Corrections) per article 8112 of this manual."). A

[12] See http://www.marinecorpstimes.com/news/2010/02/marine_quantico_brig_death_020410w/.

desire to protect one's professional reputation and avoid public embarrassment is not a legitimate non-punitive purpose justifying the imposition of restrictive confinement conditions.

134. Further, evidence shows that certain Brig officials made decisions regarding PFC Manning's confinement either "because they could" or in order to further their own professional self-interest. CWO4 Averhart's decision to place PFC Manning under Suicide Risk came right after he told PFC Manning that he was, for all practical purposes "God" and that consequently, he could make any decision he wanted. CWO2 Barnes is understood to have indicated that she would not change PFC Manning's confinement conditions because it was not worth the risk to her career. Both of these officials' decisions were arbitrary, capricious, and reflected a desire to protect their self-interest at the expense of PFC Manning. Since the decisions were made for non-legitimate purposes, they constitute punishment in contravention of PFC Manning's Article 13 rights.

g) Quantico Brig Officials Were Grasping At Straws To Use Anything PFC Manning Did and Said (or Didn't Do or Didn't Say) Against Him

135. Further evidence of intent to punish PFC Manning is found in the Brig's practice of trying to find *anything* about PFC Manning's words, conduct and demeanor that could be used against him. This is clearly evidenced in the conversation between PFC Manning and GYSGT Blenis that took place after PFC Manning had an anxiety attack at recreation call on 18 January 2011:

> PFC Manning: I got dizzy …
>
> GYSGT Blenis: Wasn't dehydration?
>
> PFC Manning: No, I was anxious because I didn't know why the guards were so edgy. … They raised their voice … And I didn't … I was getting anxious because they were getting anxious. So I was trying to figure out what was the cause of them getting anxious. It seemed to me that they were looking for something wrong…
>
> GYSGT Blenis: Something wrong as in a rules violation, or something wrong as in …
>
> PFC Manning: Yes.
>
> GYSGT Blenis: Rules violation?
>
> PFC Manning: Yes, sir. Because I've been here for a long time, so everything becomes automatic. So I don't know if I say something and they respond. I don't know what happened. I've been in, inside so long – I don't remember the last time I was outside.
> …

[Portions of the rest of the dialogue between GYSGT Blenis and PFC Manning are inaudible]

...

PFC Manning: Ok, yes, I started, I got in here and it was normal. And then I started reading my book. And then, I want to say it was MSGT [inaudible] that was the first to show up. And then he came in and was asking me all these questions. I was, ah, trying to figure out how to word the answers without causing any more anxiety. I was trying to figure out ways of not sounding, or not being construed as ... ways that things weren't going to be construed so that ... just trying to figure out ways in which I could tactfully say what I was trying to say without violating any rules and regulation or raise any concern about ...

GYSGT Blenis: Concern's already raised... [inaudible]

PFC Manning: Yes, but I'm trying not, I'm trying, I'm trying to avoid the concern, and it's actually causing the concern. I mean, cause, I'm getting ... every day that passes by, I'm getting increasingly frustrated, I'm not going to lie. Because I'm trying to do everything that I can *not to be* a concern, therefore I appear as though I am causing more concern. Or I... Or it seems that I'm causing more concern or everybody's looking for something to cause concern. So that's what frustrates me. ... Trying to work out the most politically correct way of ...

...

PFC Manning: No, no. The situation that happened today was more of ... you know, I'm lucid and aware and just trying to figure ... It's just a question of trying not to appear like I was in Kuwait. Because that's my main concern every day, is how do I get off of POI status? How do I get off of POI status? When will I be taken off of POI status? What is being used to justify the precautions? You know ... What concerns, you know, what am I doing that's concerning [inaudible]? So I'm constantly trying to figure out, run through all of those things. And trying to make sure I'm not doing anything...

...

PFC Manning: Yes, a little. I feel like the facility, honestly, is looking for reasons to keep me on POI.

GYSGT Blenis: Inaudible. I can tell you 'no'...

PFC Manning: I mean, at least not at the staff level, I'm thinking the CO – me, myself, personally.

GYSGT Blenis: Inaudible ... From a logistical standpoint, it's a burden on us. ...

PFC Manning: Yes, MSGT.

GYSGT Blenis: Nobody finds that as a joy. It's not a punitive thing, I understand why someone would see it as a punitive thing because restrictions placed [inaudible] ... I can tell you that ... since you have been here ... I wish I had a hundred Mannings ...

PFC Manning: And that's what... And that's where I don't understand why the continuation of the policy and restrictions beyond the time recommended by you and the psychiatrist. I mean the psychiatrist, is saying. I mean, I've got my own forensic psychiatrist that's saying now that the POI status is actually doing psychiatric harm and not, you know, and it's actually, you know, increasing my chances, rather than decreasing...

GYSGT Blenis: Did you feel like that two weeks ago?

PFC Manning: What's that?

GYSGT Blenis: Did you feel like that two weeks ago?

PFC Manning: Yes GYSGT.

GYSGT Blenis: Uh, two weeks ago, I asked you, like, how you were feeling and you said you were fine, do you remember that?

PFC Manning: Yes, and I still feel fine. I mean, I feel, I feel fine, but at the same time, I've been putting in, I've been putting in...

See Attachment 25.

136. The conversation clearly shows that PFC is struggling to convey his thought to GYSGT Blenis without "getting in trouble."[13] PFC Manning is desperately trying to find the right words to express his frustration with his continued classification without raising "more concern" in the minds of the Brig officials.

137. The end of the videotaped conversation is particularly telling. PFC Manning tries to express the common sense observation of his psychiatrist that the POI status may be causing him

[13] This is especially apparent if one watches the video.

psychological harm. PFC Manning says, "I mean, I've got my own forensic psychiatrist that's now saying the POI status is actually doing psychiatric harm and not, you know, and is actually, you know, increasing my chances, rather than decreasing..." *Id.* Although the video is inaudible in parts, it seems like GYSGT Blenis latches on to that particular comment to raise the red flag. That is, PFC Manning just said that POI might be causing psychological harm and might "increase[e] [his] chances, rather than decrease[] [his chances]." *Id.* What more proof do we need that POI is, in fact, justified? GYSGT Blenis then prods PFC Manning, seeking to get a damning admission from him: "Two weeks ago, I asked you, like, how you were feeling and you said you were fine, do you remember that?" *Id.* PFC Manning does not take the bait after he realizes where GYSGT Blenis is going. He says, "Yes, and I still feel fine. I mean, yes, I feel fine. Yes, but at the same time, I've been putting in..." *Id.* As is abundantly clear, PFC Manning is in an absolute "no win" situation. If he points out that POI might be causing additional psychological harm (as indicated by Brig doctors), the Brig officials will use that against him to continue to justify the conclusion that he is at risk of self-harm.

138. On 21 January 2011, PFC Manning appeared before the C&A Board and was asked about the statement on his intake questionnaire regarding suicide that he was "always planning but never acting." CWO2 Barnes describes the event as follows:

> [PFC Manning] told the Board that this statement may have been false. This then raised the obvious concern of whether he was sincere in his statements that he did not currently intend to harm himself. A member of the Board asked how they could trust any of the statements given his admission that he may have made a false statement about his suicidal thoughts at intake into the PCF. PFC Manning was also asked if it was fair to assume that the statement to the Board that he did not intend to harm himself could be false and he replied "yes." This caused great concern among the Board members given their responsibility to ensure PFC Manning's safety.

See Attachment 21.

139. It is clear to any reasonable person what happened at this meeting. PFC Manning was trying desperately to get off of POI status after so many months. He then backtracked on the statement that he had made in the intake questionnaire in the hopes that the confinement facility would see reason and remove him from POI. The C&A Board then used PFC Manning's statement against him in a classic "gotcha" moment: *Wait a second, if you were lying then about wanting to commit suicide, couldn't you be lying now about not wanting to commit suicide?* There is actually only one honest answer to this question and that is the answer that PFC Manning gave – "yes, I could be lying. *But I'm not.*" But it was too late. The C&A Board had tricked PFC Manning into giving them an answer that they could document in their paperwork to continue to justify MAX and POI. Apparently, the C&A Board saw themselves as more appropriately placed to opine on PFC Manning's risk of self-harm based on a trick question than several "06" mental health providers who continued to maintain that PFC Manning was not at risk of self-harm.

140. After this meeting, PFC Manning largely tried to avoid engaging in extensive dialogue with Brig officials. After all, anything he said or did (or didn't say or didn't do) was going to be used against him. Ironically, the fact *itself* that he had become quieter and more reserved was then used against him. In CWO2 Barnes' statement justifying why she increased the POI restrictions on PFC Manning, she states,

> There was a lack of rapport and trust between PFC Manning and the PCF staff.
> ...
> The fact that PFC Manning was not communicating with the staff as much as he had in the past ... was also a concern for me.

See Attachment 21. There is no more apt illustration of the saying, "You're damned if you do. You're damned if you don't." If PFC Manning spoke to Brig staff and participated in the C&A process,[14] his words and conduct were used against him to keep him in MAX and POI. If PFC Manning didn't speak as much to Brig staff and refused to participate in the C&A process, his lack of words and his conduct were used against him to keep him in MAX and POI.

141. In short, PFC Manning was doomed from Day 1. Brig officials looked for any little thing to use against PFC Manning to continue to effectuate Col. Oltman's orders that PFC Manning would remain in MAX and on POI for the duration of his time at Quantico. This would enable them to create the paper trail that they could later use for plausible deniability. Such is abundantly clear in MSGT Papakie's response to PFC Manning's question of why he was still in POI after so many months:

> MSGT Papakie: [chuckles to himself] I know this is no secret to you ... I have plenty of documentation. Plenty of documentation based on things that you've said, things that you've done. Actions – I have to make sure, we have to make sure, that you're taken care of.

See Attachment 25.

142. Quantico officials were never interested in actually evaluating whether PFC Manning belonged in MAX and on POI – if they were, they would have listened to recommendations from three separate Brig mental health providers. Instead, they were looking to chronicle every little thing that PFC Manning did or didn't do, or said or didn't say in order to provide them with the "plenty of documentation" they needed to support their continued decision to retain PFC Manning in MAX and on POI.

C. PFC Manning's Article 13 Rights Were Violated Because the Imposition of Onerous Confinement Conditions Served No Legitimate Government Objective

[14] The Defense is using the term "process" loosely here since it was clear that the outcome was already predetermined.

143. There was no legitimate government objective served by placing PFC Manning in MAX and POI (collectively, the functional equivalent of solitary confinement) for 9 months and by forcing him to endure humiliating treatment. There are only three potential legitimate objectives that could be conceivably served by the imposition of more restrictive than normal confinement conditions:

a) Preventing PFC Manning from harming himself;

b) Preventing PFC Manning from harming others; and

c) Ensuring PFC Manning's presence at trial.

See United States v. Crawford, 62 M.J. 411, 414(C.A.A.F. 2006)(noting that legitimate government objectives are "ensuring [detainee's] presence for trial" and "the security needs of the confinement facility"); *United States v. Willenbring*, 56 M.J. 671, 679 (Army Ct. Crim. App. 2001)(legitimate and non-punitive government objectives are "to secure and safeguard the confinement facility and to insure [detainee's] presence at trial."); *Bell v. Wolfish*, 441 U.S. 520, 540 (1979)("It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention"). *See also* Attachment 3, SECNAVINST 1640.9C, Section 5101(3)(i)("Rights are not removed from a prisoner as a punishment for a rules violation, but may be restricted, however, when there is a legitimate penological interest, such as security or safety."). The conditions of PFC Manning's confinement were not at all related (much less rationally related) to any of these objectives.

a) Preventing PFC Manning from Harming Himself

144. There was no psychiatric evidence to suggest that PFC Manning was at risk of self-harm during his time at Quantico. To the contrary, the overwhelming evidence is that PFC Manning was decidedly *not* at risk of self-harm. Brig psychiatrists had, with very few exceptions, consistently recommended for over eight months that PFC Manning be removed from POI. These recommendations were outright ignored no less than 30 times by the PCF Commander.

145. In his affidavit, Capt. Hocter references his repeated recommendations to remove PFC Manning from POI status – all of which were ignored by the Brig:

> **Question B. In your experience, does the Quantico Brig follow your recommendation concerning either Suicide Risk or Prevention of Injury Status?**
>
> 1. No. They generally keep patients on precautions longer than I recommend.

Question C. Have you made any recommendation concerning PFC Bradley Manning's custody and classification status? If so, what were your recommendations?

1. ... I initially recommended observing PFC Manning on suicide precautions for the first couple of weeks after his arrival, both because of his suicidal behavior in Kuwait and because his medical record from Kuwait included a quote or a paraphrase from PFC Manning to the effect that he could be patient when it comes to suicide.

2. After a couple of weeks, it seemed reasonable to downgrade his precaution level to Prevention of Injury (POI) status. Knowing that the Brig was very concerned about his safety, and because there had been a suicide in the Brig earlier that year, I obtained the services of another forensic psychiatrist (Col. Rick Malone) to be a consultant/second opinion. He evaluated the patient and concurred that POI was appropriate. The Brig, as I best recall, waited a couple of weeks to put this recommendation into effect.

3. Subsequently, I recommended that he be removed from POI as he continued to do relatively well in the Brig (occasional mild, odd behaviors such as dancing around were noted in the log as well as possible sleep walking). Col. Malone concurred. These recommendations were not followed.

4. In the fall (I am uncertain of the date); PFC Manning became agitated after an odd incident with staff. As best as I could tell from discussing the matter with Manning and with staff, he had been performing some kind of yoga move in which he contorted his limbs in such a way that staff thought he was trying to hurt himself. They intervened and returned him to his cell. He was very upset about this (not suicidal) and so I briefly recommended he be put back on POI status as a safeguard because he was so upset. I rescinded this recommendation the following week as he had calmed.

5. Since then, I have continued to recommend that POI precautions be removed. As of the time of my leaving for Camp Lejeune to prepare for deployment, the recommendations had not been followed. CAPT Moore and Col. Malone can provide details of what occurred next.

Question D. Have your recommendations been followed by the Quantico Brig? If not, have you been given any reason for the Quantico Brig's decision not to follow your recommendations?

1. No. My understanding is that the Brig has not followed my recommendations because of great concern and worry that Manning will harm himself. I told them I thought the Max status (with every 15 minute visual checks of the detainee vice

> POI with every 5 minute checks) was more than sufficient to ensure his safety, from a psychiatric perspective. The every 5 minute checks done for POI is extremely rigorous, particularly for a second tier precaution. Every 15 minute checks was common for suicide precautions in other jails and correctional facilities where I have worked.
> ...

See Attachment 7.

146. Capt. Hocter provided further elaboration in a subsequent affidavit:

> **Question A. Do you make recommendations to the Quantico Brig concerning whether a detainee is placed on either Suicide Risk or Prevention of Injury Status?**
>
> I make recommendation about suicide precautions, POI, and occasionally steps that Brig might take to better a detainee's condition or deportment (more time to exercise, give him a job, help him with the legal work on financial problem, let him talk to his wife or girlfriend more often, please make sure a chaplain sees him). The Brig takes these under advisement and sometimes follows them, usually not. In Manning's case, I requested, in addition to removal of precautions, more time to exercise. After quite some time, and numerous requests (it became almost comical), this was granted.
>
> **Question B. In your experience, does the Quantico Brig follow your recommendation concerning either Suicide Risk or Prevention of Injury Status?**
>
> The Brig frequently ignores or delays my recommendation regarding precautions, including suicide precautions. This differs from any of the previous jails, brigs, or prisons in which I have worked, military or civilian. This occurred even before the suicide of a detainee in January 2010. Prior to the Manning case, this, among other issues, had make working at the Brig so frustrating that I asked to be relieved of these duties. This was not permitted. I have struggled to make the best of a situation that was not professionally pleasing. The addition of forensic psychiatry fellows to the milieu (for me to teach) has been invigorating and lifted my morale.
>
> ...
>
> **Question D. Have your recommendations been followed by the Quantico Brig? If not, have you been given any reason for the Quantico Brig's decision not to follow your recommendations?**

> Neither the Brig Commander nor the Security Battalion Commander gave me any reasons for maintaining the POI precautions other than his safety. The Security Battalion Commander intimated that he was receiving instructions from a higher authority on the matter but did not say from whom. I know that the higher base authorities had a frequent (sometimes weekly) meeting to discuss Manning, for which I supplied my CO with a status report – nothing that Manning had told me, mind you, but his condition and my recommendations, particularly to remove conditions I felt were unnecessary. I did not attend these meetings, mainly to protect Manning's confidentiality against inadvertent slips. On one occasion, concern was relayed to me about the odd behaviors seen in the cell mentioned in my previous affidavit. I reported that I was not worried about the sleep walking and the dancing.
>
> I do not recall a meeting with the Base Commander (Col. Choike). The meeting I recall was with the Security BN CO, whose name I do not recall. He indicated that Manning would remain in current status (POI) unless and until he received instructions from higher authority (unnamed). I do not recall him saying he would be kept that way until his legal process was complete, but the impression he left was not to expect any changes in the near future. I cannot recall a direct quote.

See Attachment 8.

147. COL Malone also confirms that the Brig simply ignored the recommendations of mental health providers:

> **Question B. In your experience, does the Quantico Brig follow your recommendation concerning either Suicide Risk or Prevention of Injury Status?**
>
> 1. They initiate more precautions than I would from a psychiatric perspective. Were he not in custody, at this point he would be appropriate for routine outpatient care.
>
> **Question C. Have you made any recommendation concerning PFC Bradley Manning's custody and classification status? If so, what were your recommendations?**
>
> 1. No. I have stated that there is no psychiatric reason for him to be segregated from the general population, realizing that would only be one consideration.
>
> **Question D. Have your recommendations been followed by the Quantico Brig? If not, have you been given any reason for the Quantico Brig's decision not to follow your recommendations?**

> 1. They have expressed concerns about his demeanor with no medical personnel are there, describing him as more withdrawn and reading less.

See Attachment 9.

148. Not only did the Brig ignore the repeated recommendations to remove PFC Manning from POI, they also ignored medical opinions that POI was actually *causing* PFC Manning psychiatric harm. Capt. Hocter states in his affidavits:

> I believe that (at the time I last saw him) Suicide precautions and POI were excessive and were making Manning unnecessarily anxious. This could be detrimental to his mental health. I was concerned about his physical health until they started to give him more time to exercise. Since Max status is not a psychiatric classification, I did not make a recommendation regarding it except to say that it easily (as a secondary effect of checking on him every 15 minutes) met his psychiatric safety needs at the time.
>
> ...
>
> PFC Manning, according to his records from Kuwait, exhibited a disturbing level of mental instability, including suicidal behaviors. Thankfully, he was doing much better during his time with me. Inappropriate use of POI and other precautions can result in a loss of privacy and dignity that can worsen someone's condition. This could occur in Manning's case and lead to regression and additional suicidal behaviors.

See Attachments 7, 8. COL Malone agreed that POI restrictions could be detrimental to mental health, though noted that fortunately, PFC Manning "has been able to adapt somewhat":

> It has long been known that restriction of environmental and social stimulation has a negative effect on mental functioning. Nevertheless, PFC Manning has been able to adapt somewhat and his anxiety disorder is currently in remission, significantly reducing his risk of self harm.

See Attachment 9.

149. The psychologists made it known to Brig Commander that keeping PFC Manning in POI as they were was an additional stressor and damaging from a psychological perspective. The Brig Commander did not address the mental health concerns raised by the psychologists and continued to subject PFC Manning to POI restrictions.

150. Applicable Navy confinement rules themselves explicitly recognize the deleterious effects of solitary confinement and harsh conditions of confinement: "When prisoners spend long hours

in idleness and feel harassed by unnecessary restrictions, hostility is created and the desire to escape or resist become dominant forces." *See* Attachment 3, SECNAVINST 1640.9C, Section 4301.5. As such, PFC Manning faced the perverse scenario that, the longer the Brig maintained the POI status, the more likely it was that his mental health would deteriorate, thus necessitating the POI status.

151. The medical literature is replete with references to the deleterious effects of solitary confinement. In his recent testimony before the Senate, Professor Haney opines that "solitary confinement places *all* of the prisoners exposed to it at grave risk of harm." (emphasis in original). He continues:

> Despite the methodological limitations that come from studying human behavior in such a complex environment, most of the research has reached remarkably similar conclusions about the adverse psychological consequences of solitary confinement. Thus, we know that prisoners in solitary confinement suffer from a number of psychological and psychiatric maladies, including: significantly increased negative attitudes and affect, irritability, anger, aggression and even rage; many experience chronic insomnia, free floating anxiety, fear of impending emotional breakdowns, a loss of control, and panic attacks; many report experiencing severe and even paralyzing discomfort around other people, engage in self-imposed forms of social withdrawal, and suffer from extreme paranoia; many report hypersensitivity to external stimuli (such as noise, light, smells), as well as various kinds of cognitive dysfunction, such as an inability to concentrate or remember, and ruminations in which they fixate on trivial things intensely and over long periods of time; a sense of hopelessness and deep depression are widespread; and many prisoners report signs and symptoms of psychosis, including visual and auditory hallucinations. Many of these symptoms occur in and are reported by a large number of isolated prisoners. For example, in a systematic study I did of a representative sample of solitary confinement prisoners in California, prevalence rates for most of the above mentioned symptoms exceeded three-quarters of those interviewed.
>
> In addition to the above clinical symptoms and syndromes, prisoners who are placed in long-term isolation often develop what I have characterized as "social pathologies," brought about because of the pathological deprivations of social contact to which they are exposed. The unprecedented totality of control in these units occurs to such an exaggerated degree that many prisoners gradually lose the ability to initiate or to control their own behavior, or to organize their personal lives. Prisoners may become uncomfortable with even small amounts of freedom because they have lost confidence in their own ability to behave in the absence of constantly enforced restrictions, a tight external structure, and the ubiquitous physical restraints. Even the prospect of returning to the comparative "freedoms" of a mainline maximum security prison (let alone the free world) fills them with anxiety.

> For many prisoners, the absence of regular, normal interpersonal contact and any semblance of a meaningful social context in these isolation units creates a pervasive feeling of unreality. Because so much of our individual identity is socially constructed and maintained, the virtually complete loss of genuine forms of social contact and the absence of any routine and recurring opportunities to ground thoughts and feelings in a recognizable human context lead to an undermining of the sense of self and a disconnection of experience from meaning. Some prisoners experience a paradoxical reaction, moving from initially being starved for social contact to eventually being disoriented and even frightened by it. As they become increasingly unfamiliar and uncomfortable with social interaction, they are further alienated from others and made anxious in their presence. In extreme cases, another pattern emerges: this environment is so painful, so bizarre and impossible to make sense of, that they create their own reality—they live in a world of fantasy instead. Finally, the deprivations, restrictions, the totality of control, and the prolonged absence of any real opportunity for happiness or joy fills many prisoners with intolerable levels of frustration that, for some, turns to anger, and then even to uncontrollable and sudden outbursts of rage.

See Attachment 37. Based upon well-documented medical literature, it is clear that prolonged periods of solitary confinement causes severe psychological consequences. This extensive scientific evidence has been widely accepted by federal courts. For instance, the Seventh Circuit observed that "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988). In *Davenport*, the court recognized that "there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant) . . . .". *See also Miller ex rel. Jones v. Stewart*, 231 F.3d 1248, 1252 (9th Cir. 2000)("it is well accepted that conditions such as those present in the [super-max unit] . . .can cause psychological decompensation to the point that individuals may become incompetent"); *Comer v. Stewart,* 215 F.3d 910, 915 (9th Cir. 2000)("we and other courts have recognized that prison conditions remarkably similar to [the super-max unit] can adversely affect a person's mental health"); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998)("[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies"); *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998)("[the notion that] prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995)("many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in [the Security Housing Unit]"); *Bono v. Saxbe*, 450 F. Supp. 934, 946 (E.D. Ill. 1978) ("[p]laintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit"), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980); *Koch v. Lewis*, 216 F. Supp. 2d 994, 1001 (D. Ariz.

2001)(experts agreed that extended isolation causes "heightened psychological stressors and creates a risk for mental deterioration"); *Baraldini v. Meese*, 691 F. Supp. 432, 446–47 (D.D.C. 1988)(citing expert testimony on sensory disturbance, perceptual distortions, and other psychological *effects of segregation), rev'd on other grounds sub nom. Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989).

152. Thus, in ostensibly "protecting him from himself" (which the Defense submits is not what the Brig was actually doing), confinement facility officials were actually *causing* PFC Manning psychological harm.[15] In other words, the Brig authorities used the pretext of safeguarding PFC Manning from his own mental instability to keep him under conditions of extreme psychological stress for nearly nine months. In this respect, the Defense requests that this Court also consider the *amicus* filing from Psychologists for Social Responsibility. *See* Attachment 41.

153. The Brig continually pointed to PFC Manning's Suicide Risk status in Kuwait to justify the decision to maintain PFC Manning on POI status. In his Response to PFC Manning's Article 138 Complaint, Col. Choike justified the POI status as reasonable in light of all the information "including his concern over [PFC Manning's] comment regarding 'always planning' suicide at initial intake, his actions in actually making a noose at the previous facility [and] his erratic behavior at the previous facility." *See* Attachment 19. All of these events occurred approximately 8 months prior to PFC Manning's filing of the Article 138 Complaint, when PFC Manning was first arrested, was in an unfamiliar environment, and did not have the support of friends, family and counsel. PFC Manning tries to explain this to GYSGT Blenis, to no avail:

> GYSGT Blenis: [largely inaudible] Let's go back to today. ... The anxiety here, today. That's not the first time it's happened since you've been in confinement. As far as I know, it is the first time it's happened since you've been here ... but a similar situation ...
>
> PFC Manning: I wasn't, in Kuwait, I had no idea what was going on generally.

---

[15] The Defense submits that, to the extent that there might have been isolated instances of unusual behavior, it is the direct result of being locked behind bars, starved of all human contact, and watched like a zoo animal for a period of 9 months. *See* Attachment 40. Indeed, Brig psychiatrists were not at all concerned about some of the apparent odd behavior exhibited by PFC Manning (to the extent that it occurred). For instance, Capt. Hocter stated in his affidavits:

> Subsequently, I recommended that he be removed from POI as he continued to do relatively well in the Brig (occasional mild, odd behaviors such as dancing around were noted in the log as well as possible sleep walking). Col. Malone concurred. These recommendations were not followed.
> ...
>
> On one occasion, concern was relayed to me about the odd behaviors seen in the cell mentioned in my previous affidavit. I reported that I was not worried about the sleep walking and the dancing.

COL Malone also factored in the apparent odd behavior in making his weekly recommendation that PFC Manning was not at risk of self-harm. What is clear, though, is that the Brig *itself* created the circumstances which it then used to justify the conditions of confinement.

GYSGT Blenis: But, would you say it was similar situation?

PFC Manning: No, no. The situation that happened today was more of … you know, I'm lucid and aware and just trying to figure … It's just a question of trying not to appear like I was in Kuwait. Because that's my main concern every day, is how do I get off of POI status? How do I get off of POI status? When will I be taken off of POI status? What is being used to justify the precautions? You know … What concerns, you know, what am I doing that's concerning [inaudible]? So I'm constantly trying to figure out, run through all of those things. And trying to make sure I'm not doing anything…

GYSGT Blenis: [inaudible] … As time goes on, we have less of a concern, ok?

PFC Manning: Yes, GYSGT. But the restrictions were still in place. And I was …

GYSGT Blenis: Right. And we continually… We understand it's not normal that we have someone in POI for this period of time…

PFC Manning: Yes.

GYSGT Blenis: It's not [normal] … I guess we'll just leave it at that. So as we go on, we're going to lessen your restrictions. They're still be restrictions in place … [inaudible] But I would have to disagree with you as far as what happened today happened in Kuwait … anxiety attack …

PFC Manning: No, in Kuwait, I wasn't lucid. I had …. [guard interrupts] It was like a dream…

GYSGT Blenis: But, they both ultimately ended up in you having an anxiety attack … controlled fall, but …

PFC Manning: No, I don't remember falling in Kuwait at all.

GYSGT Blenis: Well, I can tell you, that's what was reported to us … none of us where there [refers again to PFC Manning's suicide status Kuwait] … Us, as a facility, we have to always err on the side of caution, okay. And not just the side of caution, but over-caution. Especially when we're talking about suicide, okay? Nobody's saying you're going to kill yourself, alright? [inaudible] But we always have to be more cautious than that. But you're saying that 'nobody else is on suicide watch.' The thing is what happened in Kuwait, what happened today …

> PFC Manning: Those are totally different. I understand, I understand, I understand, where you're getting that ... from the documentation. I mean, I quite, I know where I am. I know I am ... I know I am at Quantico base facility. I know that I'm at a brig. I mean, I'm lucid and aware of where I am. I'm not ...

See Attachment 25.

154. The concerns about Kuwait could not legitimately continue to indefinitely form the basis for PFC Manning's POI status, over the more compelling recommendations of multiple mental health providers. The justification was thus disingenuous and pre-textual in light of the clear psychiatric evidence to the contrary, and the Brig's own stated procedures for reviewing POI status. Brig officials appeared to be saying that if a detainee ever makes a comment about suicide at any point in his incarceration, the detainee is *de facto* at risk for suicide. Consequently, nothing the detainee could ever say or do subsequently would matter in the classification of the detainee.

155. Even if the Brig's concern about PFC Manning's risk for self-harm were not pre-textual (which the Defense submits that it was), such a concern was nonetheless exaggerated and grossly out-of-proportion to the risk presented. Where a restriction imposed on a detainee is "arbitrary" or "excessive" the restriction does not serve a legitimate government purpose. *See United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006)(constitutional violation is established where "conditions [are] unreasonable or arbitrary in relation to both purposes" of "ensuring ... presence for trial and the security needs of the confinement facility"). Here, the burdens placed upon PFC Manning under the guise of protecting him from self-harm were arbitrary, unreasonable and excessive, mandating a conclusion that PFC Manning's Article 13 rights have been violated.

156. The Brig's response to PFC Manning's comment about the waistband of his underwear is illustrative of the (willful) lack of logic that confinement officials brought to bear when it came to PFC Manning. Any reasonable person could see that after eight months in MAX and under POI, a detainee would become increasingly frustrated and might say something provocative. A reasonable person would see that PFC Manning was not actually planning on killing himself with the elastic band of his underwear. And yet, the Brig refused to see logic. This is true even though Brig psychiatrists had specifically opined that PFC Manning's comment about the elastic band of his underwear was part of the process of his "intellectualization" of his conditions of confinement and was in no way related to any suicidal ideations on the part of PFC Manning. *See* Attachments 2, 9. The 4 March 2011 C&A Board noted that, "[PFC Manning's] comments have raised concern that [PFC Manning] may be formulating a plan to potentially kill himself." *See* Attachment 6. If PFC Manning were truly "formulating a plan to potentially kill himself," would he tell Brig guards exactly how he was going to do it? Again, logic seems to have been checked at the gates of the Quantico confinement facility.

157. After PFC Manning made this comment, the Brig increased the special handling instructions on PFC Manning, such that there was now a requirement that he strip naked and wear a suicide smock at night. *See* Attachment 26. This requirement was arbitrary,

unreasonable and excessive in light of the perceived threat of self-harm. PFC Manning was under 24-hour surveillance, with guards never being more than a few feet away from his cell. Even if he wanted to, how could PFC Manning use his underwear to potentially commit suicide without anyone noticing? Presumably, a guard would notice PFC Manning removing his underwear and pulling at the elastic band in an effort to extract it from his underwear and then attempt to use it to kill himself. Moreover, PFC Manning was permitted to have his underwear and clothing during the day, with no apparent concern that he would harm himself during daylight hours.

158. Further, the smock itself posed a greater risk to PFC Manning in terms of being a choking hazard than PFC Manning's underwear. On one occasion, PFC Manning got trapped inside the smock. The situation is explained in an Incident Report on 13 March 2011:

> Ma'am, on the above date and time while performing my duties as special quarters supervisor, I, LCPL Miller, noticed Det. Manning #10075/9504 had his head and arms inside of his POI jump suit. I then woke up SND and told him that I need to see his face and to poke his head out. While doing what I instructed him to do, SND realized he was stuck and began to roll around, saying, "I hate this stupid thing." I then told SND to calm down and stand up and try to pull the POI jump suit over his head, but his arms were still stuck. I then called for the watch supervisor, CPL Sanders, to come down to special quarters to look at the situation and get permission to open cell 191 and help SND. Upon CPL Sanders arrival, he evaluated the situation and opened cell 191 to help SND free his arms. Once SND was situated, I then told him not to put his head and arms inside his POI jump suit again, and that if he is cold to use his second POI blanket instead. The DBS was then notified and this report was written, and the incident was recorded on camera.

See Attachment 27.

159. Despite this incident and the recommendation of Brig psychiatrists, CWO2 Barnes refused to change the decision to require PFC Manning to surrender his clothing and wear a smock at night. She stated, "I have considered your complaint that the decision to remove your clothing during sleeping hours is improper. I disagree. The removal of your clothing on 2 March 2011 was done to ensure your safety and was a direct result of your comment ... regarding the waistband in your underwear which you considered to be dangerous." *See* Attachment 20. Despite all logic to the contrary, Brig officials continued to require that PFC Manning wear the smock at night, apparently out of concern that PFC Manning planned to kill himself with his underwear.

160. Further evidence of the lack of rational connection between measures adopted by the Brig and a legitimate government objective is found in the measures associated with placing PFC Manning on Suicide Risk on 18 January 2011. Col. Choike noted in his response to the Article 138 Complaint that the decision to place PFC Manning on Suicide Risk on that date necessitated

"only a few" additional special handling instructions, one of which was the removal of PFC Manning's eyeglasses.[16] *See* Attachment 19. It is impossible to conceive of a legitimate government objective to be served in removing PFC Manning's eyeglasses, forcing him to sit for three days in his cell in essential blindness, dizzy and disoriented.

161. It is similarly impossible to rationalize any of the other restrictions imposed on PFC Manning under either his POI or MAX status. A few of the absurd restrictions are outlined below:

a) **Constant Monitoring:** It stands to reason that asking PFC Manning every five minutes "are you okay?" would not ensure that PFC Manning was, in fact, okay. Moreover, common sense dictates that that being asked "are you okay?" thousands of times over the course of nine months would actually exacerbate a detainee's sense of frustration and cause mental anxiety.

b) **Inability to Lay Down in His Cell or Place His Back Against the Wall:** There does not appear to be any legitimate penological reason for refusing to allow PFC Manning to lay down in his cell, particularly when he was locked in it for over 23 hours per day. How would allowing PFC Manning the ability to lay down increase his risk of self-harm? Similarly, what possible justification could there be for not allowing a detainee to lean his back against the wall, instead requiring him to sit up straight for all his waking hours?

c) **Limitations on Reading Material:** It is unclear how allowing PFC Manning only one book or magazine in his cell at a time is related to the prevention of self-harm (especially because PFC Manning was permitted to have a copy of the Brig's rules and regulations in his cell at all times). How would having two or three books or magazines in his cell increase PFC Manning's risk of self-harm?

d) **Restrictions on Correspondence:** For much of the time that PFC Manning was at Quantico, he was only permitted one hour of correspondence time. Again, how would permitting additional correspondence time increase PFC Manning's risk of self-harm?

e) **Refusal to Allow PFC Manning Basic Hygiene Items:** It is impossible to understand why PFC Manning was not permitted to have toilet paper in his cell and instead was required to ask for it every time he wanted to go to the bathroom. This restriction was arbitrary, excessive and degrading.

f) **Restrictions on Exercise**: PFC Manning was prohibited from exercising in his cell. However, he was permitted to exercise at recreation call. It is unclear what the difference between the two is, and why one does not present a risk of self- harm, while the other

[16] The fact that placing PFC Manning on Suicide Risk necessitated "only a few" additional handling instructions demonstrates that there is not a significant distinction between Suicide Risk and POI status. However, the Brig was not permitted to maintain PFC Manning on Suicide Risk status because that would have required the recommendation of the Brig's mental health provider (which the Brig decidedly did not have).

does. Moreover, Capt. Hocter pleaded with the Brig to allow PFC Manning to exercise in his cell. On 2 December 2010, for instance, Capt. Hocter wrote in his psychiatric evaluation:

> Pt reports good mood and no SI [suicidal ideations]. Does not require POI from a psychiatric perspective.
>
> Please let Pt do calisthenics in his cell. Thanks.

See Attachment 2 (large writing in original).

162. In short, the conditions imposed on PFC Manning to purportedly ensure that he would not harm himself were wholly nonsensical. *See, e.g. United States v. Thompson*, 2008 WL 2259762 (A. F. Ct. Crim. App.)("Nor are we able to see how forcing the appellant to remain on her bed, without talking, somehow increased the government's assurance that she would be available for trial beyond that guaranteed by her general confinement").

163. In *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985), Chief Judge Everett found that conditions less restrictive than the ones imposed on PFC Manning were not related to a legitimate government objective. He stated:

> For purposes of the motion, the Government admitted that appellant was initially placed in a single cell about 6–feet by 7–feet, with a desk, toilet, chair, and bed. He was only allowed to wear his undershorts, and to either sit at the desk or stand from 0400 hours to 2200 hours. His only reading materials were a Bible and the brig regulations. He was not allowed to write or receive letters, lie on the bed between reveille and taps, or communicate with other prisoners.
>
> Some of these conditions *are far more onerous* than would be required to assure the detainee's presence and so they violated Article 13. Regardless of the restrictions that might be imposed on sentenced prisoners without violating Article 55, [] it is hard to see why a pretrial detainee should be prohibited from corresponding with persons outside the facility, such as his lawyers, family, or friends; or be required to be only in undershorts and in the daytime to sit or stand, rather than to lie in bed. No "alternative purpose" which seems reasonably related to a legitimate governmental objective "is assignable for" these conditions.

Id. at 99-100 (emphasis supplied). Chief Judge Everett also emphasized that "[i]n arriving at this conclusion, I have heeded the Supreme Court's warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.*

164. Even if the restrictions placed upon PFC Manning were in some way related to a legitimate government objective, they were nonetheless grossly exaggerated in light of any actual evidence that PFC Manning was at risk of self-harm. For instance, for five months, PFC Manning was forced to "exercise" while his hands and feet were shackled, with a guard accompanying his every step. While this would certainly ensure that he wouldn't harm himself, others, or escape from the confinement facility, such a requirement appears wholly out-of-proportion to the risk presented. *See United States* v. *Contreras,* 2011 WL 2864311, *5 (N.-M. Ct. Crim. App.)("We agree with the military judge that while it was permissible to assign the appellant cleaning responsibilities, it was impermissible to have him clean in hand and leg irons.").

165. It is clear that the numerous restrictions placed on PFC Manning owing to his classification as a MAX detainee under POI status were not related to the legitimate government objective of preventing PFC Manning from harming himself. Nor, as discussed below, were the restrictions placed on PFC Manning legitimately related to either protecting other inmates or ensuring PFC Manning's presence at trial.

b) Preventing PFC Manning from Harming Others

166. There was equally no basis to conclude that PFC Manning was a risk to others, thereby justifying his continued classification in MAX custody. The Brig notes continually indicate that PFC Manning had been an "above average" detainee. *See* Attachment 5. GSYGT Blenis, in his conversation with PFC Manning, indicated that he "wish[ed] he had a hundred Mannings." *See* Attachment 25. The Pentagon has claimed publicly that PFC Manning has been an "exemplary" detainee. PFC Manning had always been pleasant, respectful and cooperative with Brig officials and guards.[17]

167. PFC Manning had never exhibited any violent tendencies towards other inmates at Quantico. The Brig psychiatrists indicated that he was not a risk to others. In response to a question as to whether they had "seen or documented any behavior to suggest that he is a risk to harm others or himself, a disruptive detainee, or otherwise noncompliant with Quantico Brig rules and procedures," Capt. Hocter and COL Malone responded as follows:

[17] In his 24 January 2011 submission, CWO4 Averhart states that PFC Manning had violated prisoner rules and regulations by not following instructions. He further states, "I have not imposed any disciplinary segregation, but these incidents do cause me continuing concern regarding his safety and intentions." *See* Attachment 15. The rules "violations" that CWO4 Averhart refers to are exceedingly minor (*See* Attachment 39) and do not provide a basis, under any stretch of the imagination, for a "continuing concern regarding his safety and intentions." For example, on one occasion, a Brig guard documents an incident where PFC Manning was choking on a piece of meat; after the guard dislodged it, PFC Manning indicated that he did not need medical care. On one occasion, PFC Manning declined his recreation call because his medication made him extremely tired. On yet another occasion, a Brig guard reported that after explaining to PFC Manning something dealing with the television schedule, PFC Manning indicated he was done watching TV and it could be turned off. Frankly, with some of these reports, it is not even clear what the "incident" is or why it is at all significant. Regardless, these are apparently the sorts of incidents that CWO4 Averhart refers to as somehow supporting the conclusion that he had "continuing concern" regarding PFC Manning's safety and intentions. A look at the incident reports themselves, however, completely undermines CWO4 Averhart's statement.

> Capt. Hocter:
> Not since I met him. Given the report from Kuwait, I had expected more difficulty.
> ...
> Given the amount of scrutiny he received from the Brig, and the seriousness of his charges, I had expected him to have many more problems. I had initially suspected that we would see regression and perhaps some suicidal behaviors. He held up remarkably well. He was generally a well behaved detainee.
>
> COL Malone:
> I have never heard of him being disruptive, but he does make provocative comments to the staff as part of his intellectualization (e.g. 2 March 2011).

See Attachments 7-9.

168. Notably, the offenses with which PFC Manning is charged— offenses of which PFC Manning has not been convicted—do not involve violence. There was absolutely no reason to believe that the safety of other inmates would be compromised if PFC Manning were classified as a Medium Custody detainee. *See Lock v. Jenkins,* 641 F.2d 488, 494 (7th Cir. 1981)(the "state's interest in secure confinement of [pretrial detainees] may justify confinement of particular detainees because of their *known characteristics*, ... additional severity in treatment in the absence of knowledge of their individual characteristics is clearly excessive and amounts to punishment")(emphasis supplied). *See also United States v. Swan*, 45 M.J. 672 (N-M. Ct. Crim. App. 1996)(solitary confinement justified to protect other detainees); *United States v. Crawford*, 62 M.J. 411, 415 (C.A.A.F. 2006)(maximum custody appropriate where accused presented a "high risk of future serious misconduct including mass violence and physical harm to others").

169. In *United States v. Singleton*, 59 M.J. 618 (Army Ct. Crim. App. 2003), the accused was held for 57 days in special quarters before he was transferred to the general confinement population. In that case, the accused had been charged with "serious, violent offenses" (rape of a minor), had failed to comply with restrictions ordered by his company commander, and had a serious drug and alcohol problem. *Id.* at 623-4. Thus, the temporary placement of the accused in special quarters for 57 days was justified. Here, PFC Manning spent approximately 265 days in solitary confinement at Quantico. He was not charged with a violent offense; he did not have any disciplinary issues; and did not have any drug or alcohol problems. If it was not necessary to keep a violent sex offender who disobeyed orders in special quarters, surely it was not necessary to keep PFC Manning in MAX custody in order to protect others.

170. It should be noted once again that PFC Manning is 5'3 in height and 115 pounds in weight. Presumably, Brig guards would have been able to easily restrain PFC Manning in the extremely unlikely event that he were to be disruptive and pose a danger to others. Moreover, the Defense would venture to guess that other pretrial detainees could "hold their own" if some sort of altercation ensued. Placing PFC Manning in shackles and locking down a Marine confinement facility every time PFC Manning was moved (e.g. to speak with his counsel on the phone; to

attend his sunshine call) was clearly excessive and arbitrary in considering whether PFC Manning's confinement conditions serve the government objective of ensuring the safety of other detainees.

c) Ensuring PFC Manning's Presence At Trial

171. Finally, PFC Manning's confinement conditions were not rationally related to the government objective of ensuring PFC Manning's presence at trial. There is no indication that PFC Manning was a flight risk at the time of his confinement at Quantico. *United States v. Crawford*, 62 M.J. 411, 415 (C.A.A.F. 2006)(additional restrictions warranted because detainee was "both a flight risk and a serious risk of future misconduct."); *United States v. Willenbring*, 56 M.J. 671, 678-9 (Army Ct. Crim. App. 2001)(additional restrictions warranted because "Brig officials clearly had reason to believe that [detainee] was a flight risk and posed a risk to others ... The record establishes a litany of violent, predatory, and dangerous criminal behavior.").

172. In PFC Manning's case, he was an exemplary inmate who never gave Brig officials reason to believe he was a flight risk. *See United States v. Fuson*, 54 M.J. 523, 526 (N-M. Ct. Crim. App. 2000)(holding that imposition of harsher conditions on accused was not justified on the basis that accused was a flight risk, noting that the accused "was not a 'management problem' or a disciplinary problem in the brig. His conduct was consistently evaluated as 'sat,' (satisfactory)..."); *United States v. Brown*, 2006 WL 1662963, *4 (N-M. Ct. Crim. App.)("... this court has warned of the danger of basing pretrial confinement decisions *solely* on the seriousness of an offense or the maximum punishment authorized. In this case, the appellant had already demonstrated that he was not a flight risk for an extended period of time.").

173. The Brig, however, used the seriousness of the charges to conclude – for all time and for all purposes – that PFC Manning was a flight risk. The seriousness of the charges themselves, however, cannot justify an automatic conclusion that a pretrial detainee is a flight risk and thus belongs in MAX custody. *See United States v. Scalarone*, 52 M.J. 539, 544 (N-M. Ct. Crim. App. 1999)(finding that the "focus on the possibility of the [accused's] escape due to the seriousness of the charges, as the reason[] to assign him to "Special Quarters," resulted in the imposition of conditions more rigorous than necessary to ensure his presence for trial."); *United States v. Hancock*, 2011 WL 2557622 (N-M. Ct. Crim. App.)(finding unlawful pretrial punishment where the accused had spent 136 days in solitary confinement as an arbitrary response to the seriousness of the charges against him); *United States v. White*, 2006 WL 4579019 (N.-M. Ct. Crim. App.)(finding illegal pretrial punishment where custody determination was based solely on the severity of the murder charge against the accused; court noted that "the maximum custody conditions were not rationally based on security concerns taking into account all of the circumstances, and the resulting conditions were more rigorous than necessary to ensure the [accused's] presence at his trial."); *United States v. Kinzer*, 56 M.J. 739 (N-M. Ct. Crim. App. 2001)(finding illegal pretrial punishment where Marine brig had a "standard procedure ... that detainees facing more than seven years of confinement were considered escape risks per se, and assigned to special quarters"). Otherwise, any detainee facing serious criminal

charges would automatically be deemed a flight risk and relegated to MAX custody for the duration of his time in pretrial confinement.

174. That the seriousness of the charges formed the basis for the decision to retain PFC Manning in MAX and on POI is evident in Col. Choike's Response to PFC Manning's Article 138 Complaint. Col. Choike states:

> Classification of prisoners is governed by reference (c). Classification criteria ... include, but are not limited to: assaultive behavior, serious criminal record (convicted or alleged), low tolerance of frustration, poor home conditions or family relationships, mental evaluations indicating serious neurosis or psychosis, demonstrated pattern of poor judgment, and length of potential sentence. The charge sheet available to the PCF upon confinement alleged breaches of security regulations and the leakage of classified documents involving national security.

See Attachment 18.

175. What is telling is that Col. Choike proceeds to list all the factors that should be considered in the classification decision, but only hones on one: the seriousness of the charges. *See also id.* ("Although your mental state was a primary concern and focus, it was not the only factor justifying MAX custody. You are facing serious charges involving wrongfully accessing and transferring classified information and a maximum punishment of 52 years of confinement and a dishonorable discharge.").

176. In Col. Choike's Response to PFC Manning's Rebuttal to the Article 138 Complaint, he states:

> I have reviewed the entire record and concur that maximum custody is the appropriate classification for PFC Manning. This does not foreclose a future change in his custody classification. For this reason, his classification and assignment is continuously reviewed. However, he is pending extremely serious charges with national security implications.

See Attachment 19. *See also* Attachment 15 (CWO4 Averhart indicating that "it is my professional opinion that PFC Manning's maximum custody classification is based upon his charges, national security concerns and his behavior while in the facility.").

177. It is abundantly clear that the seriousness of the charges themselves was the primary reason why the Brig (and Col. Choike) thought it appropriate to keep PFC Manning on MAX and POI.[18] This is further evidenced by Mr. Juan Méndez's findings where he states that, "[t]o the Special Rapporteur's request for information on the authority to impose and the purpose of the isolation regime, the government responded that the prison rules authorized the brig commander to impose

[18] This is also clear when one looks at the C&A Board reviews from 3 January 2011 onward. *See* Attachment 6.

it *on account of the seriousness of the offense* for which he would eventually be charged." *See* Attachment 32 (emphasis added).

178. Applying some common sense for a moment, given that PFC Manning was in a secure Marine facility, contained within a Marine compound, it is hard to imagine any scenario under which PFC Manning would have been able to escape. Apparently, security at Quantico includes "a single chain-link fence about 20 feet high with razor wire, cameras, and guards." http://en.wiki pedia.org/wiki/Marine_Corps_Brig,_Quantico. Recall again that PFC Manning diminutive in size. The average Marine Brig guard would likely be nearly 6 feet tall and about 200 pounds. It defies logic to think that somehow, even if he wanted to, PFC Manning could escape from Quantico. The case of *United States v. Fuson*, 54 M.J. 523, 526 (N-M. Ct. Crim. App. 2000) is apposite in this context. In that case, the trial counsel argued:

> Your Honor, the reason why the accused is in special quarters is because of his medical condition. It's not a form of punishment. It's because it is to protect himself and to maintain good order within the brig. *Id.* at 526.

179. The court did not accept what it saw as a nonsensical argument, stating, "We cannot condone the imposition of harsher conditions upon a military accused because he has an injury or, for that matter, suffers from some other illness. We think it is somewhat obvious that having a strained right knee does not make an accused a greater flight risk or that placement in 'special quarters' is necessary to ensure the presence of such injured personnel for trial." *Id.* at 527. Likewise, the Defense submits that it is "somewhat obvious" that, given PFC Manning's physical stature and his location in a secure confinement facility *within* a secure Marine compound, that he was not legitimate flight risk.

180. Moreover, the Government did not have a greater interest in ensuring that PFC Manning appeared at trial than it did with any other pretrial detainee confined at the Quantico Brig. And yet, other detainees were not subjected to these conditions. *See United States v. Harris*, 2007 WL 1702575, *2 (finding illegal punishment where "the Government presented no evidence that [detainee] was a flight risk or that there was any risk that he would harm himself or others if lesser degrees of restraint were utilized."); *United States v. Fricke,* 53 M.J. 149, 154 (C.A.A.F. 2000)(noting that conditions similar to those alleged by accused [confinement in cell for 23 hours a day] "have previously been considered far more onerous than would be required to assure [accused's] presence [at trial].")(citations omitted).

181. In his response to PFC Manning's Article 138 Complaint, Col. Choike noted that in determining PFC Manning's classification status, relevant concerns included "national security concerns and protection of classified material." *See* Attachment 19. It is impossible to fathom how "national security concerns" and "protection of classified material" would be impacted if PFC Manning were to be retained in MDI (rather than MAX) and not under POI status. As such, these factors are unrelated to any legitimate government objective – and in particular, to the objective of ensuring PFC Manning's presence at trial. Also in this Response, Col. Choike astoundingly refers to all these conditions as "narrowly tailored." *See id.* Not only were the

conditions decidedly not narrowly tailored, they were arbitrary, purposeless and bore no relation to a legitimate governmental goal. *See United States v. Crawford*, 62 M.J. 411, 416 (C.A.A.F. 2006)("we [do not] condone arbitrary policies imposing 'maximum custody' upon pretrial prisoners."); *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989)(conditions that are arbitrary or purposeless can be considered to raise an inference of punishment).

182. The decision to retain PFC Manning under MAX and POI cannot be justified by general averments that "the PCF Commander has the inherent authority over those in his custody to maintain good order and discipline and the responsibility to ensure safety and security in the PCF." *See* Attachment 18. As the 7th Circuit aptly stated in *Lock v. Jenkins*, 641 F.2d 488, 498 (7th Cir.1981), courts need not "grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline." In this case, there has been nothing but "ritual incantations."

183. It is evident that the decision to retain PFC Manning in the functional equivalent of solitary confinement for almost nine months was arbitrary, capricious and not rationally related to a legitimate government objective. It is worth noting that the Marine Corps has long history of arbitrary and unreasonable Brig policies which amount to pretrial punishment.

184. For instance, in *United States v. Anderson,* 49 M.J. 575 (N-M. Ct. Crim. App. 1998), the court found that there was an "unwritten policy" at the Camp Pendleton Marine confinement facility that "places pretrial confines in maximum-custody status based solely on whether the potential confinement they face is greater than 5 years." *Id.* at 576. In finding that this constituted unlawful pretrial punishment, the court stated:

> Based on the information available to the court, we are very concerned about what appears to be an arbitrary policy to place in maximum confinement all persons who face a period of confinement in excess of 5 years. All such persons apparently remain in maximum confinement, with all the deprivations that entails, until trial or such time as the service member enters into a pretrial agreement capping confinement at 5 years or less.
>
> We recognize, of course, that the potential length of confinement a service member faces is a relevant factor in determining the likelihood he may attempt to flee. Moreover, the seriousness and nature of the offenses can be relevant in determining both the individual's flight risk as well as whether he represents a danger to others in the brig. We are hesitant to second-guess the decisions of brig personnel, who are required to maintain good order and discipline under difficult circumstances. Based on their extensive training and experience, we recognize that such personnel are generally much better equipped than are we to make such tough calls. Had the decision-making process considered all the relevant factors, we would intervene only under the most unusual circumstances. Here, however, the Government has made no effort to rebut the appellant's contentions that the length of potential confinement was the *only* factor brig personnel considered.

> Before significantly curtailing the freedom of Marines facing general courts-martial, this court and others responsible for the military justice system must ensure the integrity of the system. These decisions cannot be based on a single blanket criterion to the exclusion of all other factors.

Id. at 576-7 (emphasis in original).

185. The Court also expressed concern "about this policy's coercive effect on pretrial confinees. It places considerable pressure on them to enter into a pretrial agreement and then plead guilty simply to get out of maximum custody." *Id.* The court further admonished those involved "in the administration of Navy and Marine Corps brigs" to "ensure that decisions whether to place pretrial confines in a maximum-custody status are based on all relevant factors." *Id.*

186. *Anderson* is not the only case to address the arbitrary Brig policy at Camp Pendleton. *See United States v. Evans*, 55 M.J. 732 (N-M. Ct. Crim. App. 2001)("As we have found in other cases, however, we find that the decision to place the appellant in Special Quarters 1 was made in conformance with the standard operating procedures [SOP] then in existence within the brig at Camp Pendleton. That SOP required that anyone facing more than five years confinement to be automatically placed in Special Quarters 1. Accordingly, we find that the decision to place the appellant in Special Quarters 1 was based on an arbitrary policy and resulted in the imposition of conditions more rigorous than necessary to insure his presence for trial.")(citations omitted); *United States v. Rodriguez*, 2002 WL 31433595 (N-M. Ct. Crim. App.)("To the extent his custody determination was based solely on that criterion, it resulted in conditions more rigorous than necessary to ensure the appellant's presence for trial. Based upon the evidence presented to us, we find that the appellant has met his burden and the Government has not. Accordingly, we find that the decision to place and keep the appellant in special quarters was based solely upon an arbitrary policy in place at the Camp Pendleton Brig and resulted in the imposition of conditions more rigorous than the circumstances required to insure the appellant's presence at trial.")(citations omitted); *United States v. Salinas*, 1999 WL 1076885, *4 (N-M. Ct. Crim. App.)("In light of the available facts, we are convinced that the 5–year criterion for maximum custody dispositions existed at the Camp Pendleton Base Brig at the time of the appellant's pretrial confinement. And, in the absence of more convincing evidence that this rule was not applied to him, and in the interest of judicial economy, we will afford the appellant an additional 128 days of judicially ordered credit to be applied against his approved sentence."). Nor is the policy that existed at Camp Pendleton an isolated one. *See United States v. Kinzer*, 56 M.J. 739, 741 (N-M. Ct. Crim. App. 2001)(arbitrary brig policy existed at Camp Lejeune).

187. Like in *Anderson* and in all the cases cited above, the Marine brig at Quantico had an arbitrary policy to keep PFC Manning (and only PFC Manning) in MAX and on POI indefinitely. As the Court of Appeal for the Armed Forces has said, "we do [not] condone arbitrary policies imposing 'maximum custody' upon pretrial prisoners. We will scrutinize closely any claim that maximum custody was imposed solely because of the charges rather than as a result of a reasonable evaluation of all the facts and circumstances of a case." *See United States v. Crawford*, 62 M.J. 411, 416 (C.A.A.F. 2006). The policy to keep PFC Manning on

MAX and POI was not based on any legitimate government objective, such as protecting PFC Manning from self-harm, protecting others, or ensuring PFC Manning's presence at trial. Instead, the decision was an "unwritten policy" by the higher-ups at Quantico who had decided that, as long as PFC Manning remained at Quantico, nothing would ever change. *United States v. Anderson,* 49 M.J. 575 (N-M. Ct. Crim. App. 1998).

188. But after PFC Manning was moved to the Fort Leavenworth Joint Regional Correctional Facility (JRCF), things did change. After a routine indoctrination period, PFC Manning was assigned to Medium Custody. The severe restrictions on his liberty have been lifted. He is now permitted to eat with other detainees, socialize with other detainees, walk around without metal shackles, have personal and hygiene items in his cell, etc. PFC Manning has been held in this status for approximately the past 15 months.

189. The fact that PFC Manning went from MAX and POI at Quantico to Medium Custody at the JRCF virtually overnight is evidence that he was improperly held in MAX and POI to begin with. *See United States v. Kinzer*, 56 M.J. 739, 741 (N-M. Ct. Crim. App. 2001)("The fact that the appellant was released from special quarters the very next day after securing a pretrial agreement that limited his post-trial confinement to only three years is strong evidence that his assignment to special quarters was based primarily upon a length-of-sentence policy, and not upon other appropriate factors. Accordingly, we find that the decision to place the appellant in special quarters was based on an arbitrary policy and resulted in the imposition of conditions more rigorous than necessary to insure his presence for trial.").

190. For the reasons outlined above, it is clear that the conditions of PFC Manning's confinement were not related – much less rationally related – to the only permissible government objectives in imposer greater than normal confinement restrictions: protecting PFC Manning from harming himself; protecting PFC Manning from harming others; and ensuring PFC Manning's presence at trial.

D. The Conditions of PFC Manning's Confinement Were so Onerous that they Permit the *Per Se* Inference that his Article 13 Rights were Violated

191. In *United States v. McCarthy,* 47 M.J. 162, 165 (C.A.A.F. 1997), the Court of Appeals for the Armed Forces held that conditions of confinement may be so egregious and onerous that "they give rise to a permissible inference that [the accused] is being punished, or may be so excessive as to constitute punishment." Such is the case here. The harsh conditions under which PFC Manning was confined over the course of nine months while in pretrial confinement at Quantico give rise a sole permissible inference: PFC Manning was punished in violation of his Article 13 rights. *See also United States v. Fulton*, 52 M.J. 767 (A. F. Ct. Crim. App. 2000)(noting that "the actions of the confinement staff were so egregious that we ... are inescapably led to only one conclusion: The [accused] was intentionally subjected to unduly rigorous conditions which cannot be supported by any legitimate government purpose.").

a) <u>The Conditions of PFC Manning's Confinement in MAX and on POI were Unduly Onerous</u>

192. PFC Manning served over nine months of confinement in MAX custody and under either Suicide Risk or POI. While PFC Manning was not technically held under the classification of "solitary confinement" (a classification that the Quantico Brig does not have[19]), the cumulative effect of PFC Manning's confinement conditions were tantamount to solitary confinement. *See United States v. Amaro*, 2009 WL 1936444, *1 (A. F. Ct. Crim. App.)(accused's confinement in "protective custody" was "tantamount to solitary confinement").

193. In his Testimony before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights Hearing on Solitary Confinement,[20] Professor Craig Haney described the characteristics of solitary confinement as follows:

---

[19] *See* Attachment 15 ("The Quantico base pretrial confinement facility does not have solitary confinement").

[20] The Committee was established to investigate the "serious human rights, fiscal, and public safety consequences" associated with the use of solitary confinement in American Prisons. *See* Statement of The Honorable Patrick Leahy, Attachment 37. Senator Leahy writes:

> Although solitary confinement was develop as a method for handling highly dangerous prisoners, it is increasingly being used with inmates who do not pose a threat to staff or other inmates. Far too often, prisoners today are placed in solitary confinement for minor violations that are disruptive but not violent. At the same time, conditions within segregation units have become increasingly harsh. In many cases, human contact is virtually eliminated. Officers deliver meal trays through a door slot, and visits by mental health staff are conducted through the cell door. Interaction with other prisoners is often not allowed, and visits with family members may be prohibited for a year or more.
>
> There are significant fiscal, safety and humanitarian consequences for this trend toward increasingly harsh conditions of solitary confinement and its more frequent use to punish non-violent behavior. Evidence provided by the Vera Institute and others now suggests that placing inmates in solitary confinement with minimal human contact for days, months and years is exceptionally expensive and, in many cases, counterproductive. Not only do these studies show that segregation does little or nothing to lower overall rates of violence, there is evidence that it actually increases recidivism rates after release, posing a danger to the public.

Id. Similarly, Senator Dick Durbin expresses the following views on solitary confinement:

> In 1995, a federal district court described similar cells at California's Pelican Bay State Prison:
>
> > "The cells are windowless; the walls are white concrete. ...The overall effect [] is one of stark sterility and unremitting monotony. Inmates can spend years without ever seeing any aspect of the outside world except for a small patch of sky. One inmate fairly described [it] as being 'like a space capsule where one is shot into space and left in isolation.'"
>
> Imagine spending 23 hours a day in a cell like that – for days, months, years – with no window to the outside world and very little, if any, human contact.
>
> The United States holds far more prisoners in solitary than any other democratic nation. The Bureau of Justice Statistics found that in 2005, U.S. prisons held 81,622 people in some kind of restricted housing. In my home state of Illinois, 56% of the prison population has spent time in segregation.

> I should acknowledge that the term "solitary confinement" is a term of art in corrections. Solitary or isolated confinement goes by a variety of names in U.S. prisons—Security Housing, Administrative Segregation, Close Management, High Security, Closed Cell Restriction, and so on. But the units all have in common the fact that the prisoners who are housed inside them are confined on average 23 hours a day in typically windowless or nearly windowless cells that commonly range in dimension from 60 to 80 square feet. The ones on the smaller side of this range are roughly the size of a king-sized bed, one that contains a bunk, a toilet and sink, and all of the prisoner's worldly possessions. Thus, prisoners in solitary confinement sleep, eat, and defecate in their cells, in spaces that are no more than a few feet apart from one another.

See Attachment 37. Thus, the combination of PFC Manning's MAX and POI status (coupled with his periodic Suicide Risk status) most certainly amounts to what would colloquially be known as "solitary confinement."[21]

194. There was absolutely no justification – and there can be no justification – for the continued decision to hold PFC Manning in solitary confinement for over nine months. In *United States v. King,* 61 M.J. 225, 229 (C.A.A.F. 2005), the Court of Appeal for the Armed Forces found an Article 13 violation where the accused was arbitrarily placed in solitary confinement for a mere two weeks. In that case, the court said, "[p]lacing [an accused] in a segregated environment with all the attributes of severe restraint and discipline, without an individualized demonstration of cause in the record, was so excessive as to be punishment ...". Similarly, in *United States v. Amaro*, 2009 WL 1936444 (A. F. Ct. Crim. App.), the Court found a violation of Article 13 and awarded 4-for-1 credit where the accused spent 33 days in conditions tantamount to solitary confinement. If a few weeks of solitary confinement cannot be tolerated, what are we to say about approximately 265 days?

195. Even where solitary confinement serves some sort of legitimate non-punitive objective, military courts have considered the length that a prisoner is placed in solitary confinement in order to discern whether the condition is imposed as punishment in violation of Article 13. In *United States v. Suttle*, 2011 WL 5221266 (N.-M. Ct. Crim. App.), the court found that the accused spent 59 days in solitary confinement in a Japanese prison for a legitimate non-punitive reason. The Court in that case emphasized that, "The conditions in special quarters were neither so onerous, *nor lingered so long*, as to constitute punishment, ..." *Id.* at *4. Here, even if MAX and POI were rationally related to a legitimate government objective (which the Defense submits

---

> ...But we now know that solitary confinement isn't just used for the worst of the worst. Instead, we are seeing an alarming increase in isolation for those who don't need to be there – and for vulnerable groups like immigrants, children, LGBT inmates, supposedly for their own protection.

Id.

[21] PFC Manning's cell at Quantico was much smaller that the cells typically seen by Professor Haney in solitary confinement. PFC Manning's cell was a windowless cell that was 48 square feet in dimension (6x8).

they were not), the conditions did in fact "linger so long[] as to constitute punishment" in contravention of Article 13.

196. Even Brig official GYSGT Blenis admitted to PFC Manning that his treatment at Quantico was "not normal." He stated, "We understand it's not normal that we have someone in POI for this period of time... It's not [normal] ... I guess we'll just leave it at that." *See* Attachment 25. Not only was the treatment not normal, it was onerous, degrading and harmful to PFC Manning's mental health. [22]

197. It is trite law that PFC Manning is presumed innocent until proven guilty. And yet, PFC Manning has been treated in a manner that would not even be appropriate for *convicted* offenders. *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980)("conditions found to constitute cruel and unusual punishment when imposed on convicted inmates would surely be viewed as unconstitutional punishment when imposed on similarly situated unconvicted detainees"). In fact, COL Malone, one of the treating psychiatrists at the Brig, has indicated that the only time he has ever seen anyone held in conditions similar to PFC Manning was when he treated prisoners *on death row*. That a psychiatrist with over a decade of experience has only witnessed conditions like the ones endured by PFC Manning when he visited death row should speak volumes as to how far outside the lines Quantico acted in imposing pretrial punishment on PFC Manning.

198. The conditions under which PFC Manning was held for over eight months ride roughshod over PFC Manning's right to be presumed innocent and his right against pretrial punishment. Even leaving aside any conceivable justification for the imposition of these restrictions, it is clear that these conditions amount to *per se* unlawful pretrial punishment.

b) The Conditions of PFC Manning's Confinement Sparked Domestic and International Outrage

199. The egregious conditions of PFC Manning's confinement sparked both domestic and international outrage. In a letter to Secretary of Defense Gates, the program director of Amnesty International wrote:

[22] The excessiveness of the restrictions placed on PFC Manning are highlighted when one looks at the corresponding Army Regulation governing corrections practices. Under Army Regulation 190-47, designation in special quarters is determined "upon recommendations of the professional support staff or correctional treatment staff *or medical authority*." *See* Section 12-6. Even where "determined necessary by a medical authority, prisoners designated for special quarters should be allowed to participate in work/training activities, consume meals with the general population, and participate in recreation programs. Special quarters will be terminated as soon as it is determined that the prisoner can be quartered satisfactorily within the general population." *Id.* Although the regulation does not provide an outermost guidepost to the length of time a detainee can spend in special quarters, it does provide that "Disciplinary segregation ... normally should not exceed 60 consecutive days. Prisoners held in disciplinary segregation for periods exceeding 60 days will be provided the same program services and privileges as prisoners in administrative segregation and protective custody." *Id.*

> Amnesty International recognizes that it may sometimes be necessary to segregate prisoners for disciplinary or security purposes. However, the restrictions imposed in PFC Manning's case appear to be unnecessarily harsh and punitive, in view of the fact that he has no history of violence or disciplinary infractions and that he is a pretrial detainee not yet convicted of any offence. The conditions under which PFC Manning is held appear to breach the USA's obligations under international standards and treaties, including Article 10 of the International Covenant on Civil and Political Rights (ICCPR) which the USA ratified in 1992 and which states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". The UN Human Rights Committee, the ICCPR monitoring body, has noted in its General Comment on Article 10 that persons deprived of their liberty may not be "subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons ...".
>
> The harsh conditions imposed on PFC Manning also undermine the principle of the presumption of innocence, which should be taken into account in the treatment of any person under arrest or awaiting trial. We are concerned that the effects of isolation and prolonged cellular confinement – which evidence suggests can cause psychological impairment, including depression, anxiety and loss of concentration – may, further, undermine his ability to assist in his defence and thus his right to a fair trial.
>
> In view of the concerns raised, we urge you to review the conditions under which PFC Manning is confined at the Quantico naval brig and take effective measures to ensure that he is no longer held in 23 hour cellular confinement or subjected to other undue restrictions.

See Attachment 28.

200. Further, almost 300 law professors signed a letter admonishing the government for the "degrading," "inhumane," "illegal," and "immoral" conditions of PFC Manning's confinement:

> The sum of the treatment that has been widely reported is a violation of the Eighth Amendment's prohibition of cruel and unusual punishment, and the Fifth Amendment's guarantee against punishment without trial. If continued, it may well amount to a violation of the criminal statute against torture, defined as, among other things, "the administration or application... of... procedures calculated to disrupt profoundly the senses or the personality."
>
> Private Manning has been designated as an appropriate subject for both Maximum Security and Prevention of Injury (POI) detention. But he asserts that his administrative reports consistently describe him as a well-behaved prisoner who

> does not fit the requirements for Maximum Security detention. The Brig psychiatrist began recommending his removal from Prevention of Injury months ago. These claims have not been publicly contested. I n an Orwellian twist, the spokesman for the brig commander refused to explain the forced nudity "because to discuss the details would be a violation of Manning's privacy."
>
> The Administration has provided no evidence that Manning's treatment reflects a concern for his own safety or that of other inmates. Unless and until it does so, there is only one reasonable inference: this pattern of degrading treatment aims either to deter future whistleblowers, or to force Manning to implicate Wikileaks founder Julian Assange in a conspiracy, or both.
>
> If Manning is guilty of a crime, let him be tried, convicted, and punished according to law. But his treatment must be consistent with the Constitution and the Bill of Rights. There is no excuse for his degrading and inhumane pretrial punishment. As the State Department's PJ Crowley put it recently, they are "counterproductive and stupid." And yet Crowley has now been forced to resign for speaking the plain truth.
>
> The WikiLeaks disclosures have touched every corner of the world. Now the whole world watches America and observes what it does; not what it says.
>
> President Obama was once a professor of constitutional law, and entered the national stage as an eloquent moral leader. The question now, however, is whether his conduct as Commander in Chief meets fundamental standards of decency. He should not merely assert that Manning's confinement is "appropriate and meet[s] our basic standards," as he did recently. He should require the Pentagon publicly to document the grounds for its extraordinary actions --and immediately end those which cannot withstand the light of day.

See Attachment 29.

201. American's foremost constitutional law scholar, Harvard Professor Laurence Tribe, denounced PFC Manning's conditions of confinement as "not only shameful but unconstitutional." *See* http://www.guardian.co.uk/world/2011/apr/10/bradley-manning-legal-scholars-letter. Professor Tribe stated that the treatment was objectionable "in the way it violates his person and his liberty without due process of law and in the way it administers cruel and unusual punishment of a sort that cannot be constitutionally inflicted even upon someone convicted of terrible offences, not to mention someone merely accused of such offences." *Id.*

202. Medical professionals also decried PFC Manning's treatment as amounting to "needless brutality." Psychologists for Social Responsibility (PsySR) sent the following letter to Secretary of Defense Gates:

As an organization of psychologists and other mental health professionals, PsySR is aware that solitary confinement can have severely deleterious effects on the psychological well-being of those subjected to it. We therefore call for a revision in the conditions of PFC Manning's incarceration while he awaits trial, based on the exhaustive documentation and research that have determined that solitary confinement is, at the very least, a form of cruel, unusual and inhumane treatment in violation of U.S. law.

In the majority opinion of the U.S. Supreme Court case Medley, Petitioner, 134 U.S. 1690 (1890), U.S. Supreme Court Justice Samuel Freeman Miller wrote, "A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." Scientific investigations since 1890 have confirmed in troubling detail the irreversible physiological changes in brain functioning from the trauma of solitary confinement.

As expressed by Dr. Craig Haney, a psychologist and expert in the assessment of institutional environments, "Empirical research on solitary and supermax-like confinement has consistently and unequivocally documented the harmful consequences of living in these kinds of environments . . . Evidence of these negative psychological effects comes from personal accounts, descriptive studies, and systematic research on solitary and supermax-type confinement, conducted over a period of four decades, by researchers from several different continents who had diverse backgrounds and a wide range of professional expertise... [D]irect studies of prison isolation have documented an extremely broad range of harmful psychological reactions. These effects include increases in the following potentially damaging symptoms and problematic behaviors: negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, and rage, paranoia, hopelessness, lethargy, depression, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior" (pp. 130-131, references removed).

Dr. Haney concludes, "To summarize, there is not a single published study of solitary or supermax-like confinement in which non-voluntary confinement lasting for longer than 10 days where participants were unable to terminate their isolation at will that failed to result in negative psychological effects" (p. 132).

We are aware that prison spokesperson First Lieutenant Brian Villiard has told AFP that Manning is considered a "maximum confinement detainee," as he is considered a national security risk. But no such putative risk can justify keeping someone not convicted of a crime in conditions likely to cause serious harm to his

> mental health. Further, history suggests that solitary confinement, rather than being a rational response to a risk, is more often used as a punishment for someone who is considered to be a member of a despised or "dangerous" group. In any case, PFC Manning has not been convicted of a crime and, under our system of justice, is at this point presumed to be innocent.
>
> ...
>
> In addition to the needless brutality of the conditions to which PFC Manning is being subjected, PsySR is concerned that the coercive nature of these conditions -- along with their serious psychological effects such as depression, paranoia, or hopelessness -- may undermine his ability to meaningfully cooperate with his defense, undermining his right to a fair trial. Coercive conditions of detention also increase the likelihood of the prisoner "cooperating" in order to improve those circumstances, even to the extent of giving false testimony. Thus, such harsh conditions are counter to the interests of justice.
>
> Given the nature and effects of the solitary confinement to which PFC Manning is being subjected, Mr. Secretary, Psychologists for Social Responsibility calls upon you to rectify the inhumane, harmful, and counterproductive treatment of PFC Bradley Manning immediately.

See Attachment 30. This organization has also submitted an amicus filing for this Court's consideration. *See* Attachment 41.

203. One member of the Obama administration was fired for his comments regarding PFC Manning's conditions of confinement. In March 2011, State Department spokesman P.J. Crowley was asked the following question, "There's an elephant in the room during this discussion: Wikileaks. The US government is torturing a whistleblower in prison right now." Crowley replied by denouncing the abuse of PFC Manning as "ridiculous and counterproductive and stupid."[23] P.J. Crowley was forced to "resign" shortly after he made the comment. P.J. Crowley later stood by his statement, saying that "if you have to explain why a guy is standing naked in the middle of a jail cell, you have a policy in need of urgent review."[24]

204. European leaders have also criticized the United States for its treatment of PFC Manning. In an open letter to President Barrack Obama, among others, members of the European parliament wrote to express concerns about human rights abuses against PFC Manning. They urged the United States to allow the United Nations to investigate the claims:

> By preventing UN officials from carrying out their duties, the United States government risks undermining support for the work of the United Nations

[23] *See* http://www.nytimes.com/2011/03/14- /us/politics/14crowley.html.
[24] *See* http://www.guardian.co.uk/commentisfree/cifamerica/2011/mar/29/bradley-manning-wikileaks.

> elsewhere, particularly its mandate to investigate allegations of torture and human rights abuses. In order to uphold the rights guaranteed to Bradley Manning under international human rights law and the US constitution, it is imperative that the United Nations special rapporteur be allowed to properly investigate evidence of rights abuses. PFC Manning has a right to be free from cruel and unusual punishment. People accused of crimes must not be subjected to any form of punishment before being brought to trial.

See Attachment 21.

205. That the conditions of PFC Manning's confinement while at Quantico sparked domestic and international outrage should have signaled that what the Brig was doing was not only wrong, but egregiously wrong. Nearly every constituency that has heard about the conditions of PFC Manning's confinement, from doctors to lawyers to politicians, has considered these conditions to constitute not only "unlawful pretrial punishment" but also a gross violation of PFC Manning's basic human rights.

c) The United Nations Special Rapporteur on Torture Was Not Permitted to Investigate the Conditions of PFC Manning's Confinement

206. The United Nations Special Rapporteur on Torture, Juan Méndez, repeatedly attempted to investigate the harsh conditions of PFC Manning's confinement only to be met with Brig assertions that any interview of PFC Manning would be subject to monitoring. In a Press Release issued by the United Nations Office of the High Commissioner, the U.N. expressed grave concern that the United States would not permit unrestricted access to PFC Manning:

> 12 July 2011
>
> GENEVA – The Special Rapporteur on Torture today expressed concerns about restrictions placed by the United States Government on his interaction with detainees.
>
> Commenting on his attempts to gain unrestricted access to Private first class Bradley Manning, a United States soldier detained for allegedly leaking classified US communications to the WikiLeaks website, Mendez said: "I am assured by the US Government that Mr. Manning's prison regime and confinement is markedly better than it was when he was in Quantico. However, in addition to obtaining first hand information on my own about his new conditions of confinement, I need to ascertain whether the conditions he was subjected to for several months in Quantico amounted to torture or cruel, inhuman or degrading treatment or punishment. For that, it is imperative that I talk to Mr. Manning under conditions where I can be assured that he is being absolutely candid."
>
> At the Special Rapporteur's request and after several meetings, the US Department of Defense has allowed Mendez to visit Pfc. Manning but warned

> him that the conversation would be monitored. Such a condition violates long-standing rules that the UN applies for prison visits and for interviews with inmates everywhere in the world. On humanitarian grounds and under protest, Mendez offered to Manning, through his counsel, to visit him under these restrictive conditions, an offer that Manning has declined.
>
> The Special Rapporteur has, since the beginning of the year, been in negotiations with the US Government over unrestricted access to Manning. Last month, the Government informed him that it was not in a position to accede to the request for a private and unmonitored meeting with Manning.
>
> "The question of my unfettered access to a detainee goes beyond my request to meet with Mr. Manning – it touches on whether I will be able to conduct private and unmonitored interviews with detainees if I were to conduct a country visit to the United States," Mendez said.
>
> He added that maintaining the principle of unfettered access to detainees is an important part of his responsibility as the UN expert on torture. It also determines whether UN experts can conduct credible enquiries into allegations of torture and ill-treatment when they visit places of detention and detainees. In 2004, the US Government allowed Mendez's predecessor, Manfred Nowak, and three other mandate-holders, access to the Guantanamo Bay facilities, but the George W Bush administration imposed conditions that the UN mandate-holders could not accept. Early in his tenure, which began on November 1, 2010, Mendez formally asked the US Government for permission to visit Guantanamo Bay, a petition that has been renewed on several occasions since then. No answer has yet been given to this request.
>
> "The United States, as a world leader, is a strong supporter of the international human rights system. Therefore, its actions must seek to set the pace in good practices that enhance the role of human rights mechanisms, ensuring and maintaining unfettered access to detainees during enquiries," he added.

See Attachment 32.

207. On 29 February 2012, the U.N. Special Rapporteur issued a statement condemning the conditions of PFC Manning's confinement and the United States' violation of the "terms of reference applied universally in fact-finding by Special Procedures" (i.e. its failure to permit an unmonitored visit). Mr. Méndez wrote:

> **United States of America**
>
> (a) UA 30/12/2010 Case No. USA 20/2010 State reply: 27/01/2011 19/05/2011 Allegations of prolonged solitary confinement of a soldier charged with the unauthorized disclosure of classified information.

170. The Special Rapporteur thanks the Government of the United States of America for its response to this communication regarding the alleged prolonged solitary confinement of Mr. Bradley E. Manning, a US soldier charged with the unauthorized disclosure of classified information. According to the information received, Mr. Manning was held in solitary confinement for twenty-three hours a day following his arrest in May 2010 in Iraq, and continuing through his transfer to the brig at Marine Corps Base Quantico. His solitary confinement - lasting about eleven months - was terminated upon his transfer from Quantico to the Joint Regional Correctional Facility at Fort Leavenworth on 20 April 2011. In his report, the Special Rapporteur stressed that "solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions." Moreover, "[d]epending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture." (A/66/268 paras. 79 and 80) Before the transfer of Pfc Manning to Fort Leavenworth, the Special Rapporteur requested an opportunity to interview him in order to ascertain the precise conditions of his detention. The US Government authorized the visit but ascertained that it could not ensure that the conversation would not be monitored. Since a non-private conversation with an inmate would violate the terms of reference applied universally in fact-finding by Special Procedures, the Special Rapporteur had to decline the invitation. In response to the Special Rapporteur's request for the reason to hold an unindicted detainee in solitary confinement, the government responded that his regimen was not "solitary confinement" but "prevention of harm watch" but did not offer details about what harm was being prevented. To the Special Rapporteur's request for information on the authority to impose and the purpose of the isolation regime, the government responded that the prison rules authorized the brig commander to impose it on account of the seriousness of the offense for which he would eventually be charged. The Special Rapporteur concludes that imposing seriously punitive conditions of detention on someone who has not been found guilty of any crime is a violation of his right to physical and psychological integrity as well as of his presumption of innocence. The Special Rapporteur again renews his request for a private and unmonitored meeting with Mr. Manning to assess his conditions of detention.

(b) AL 15/06/2011 Case No. USA 8/2011 State reply: None to date Follow-up to a letter sent 13 May 2011 requesting a private unmonitored meeting with Private (Pfc.) Bradley Manning.

171. The Special Rapporteur thanks the Government of the United States of America for its response to the communication dated 13 May 2011 requesting a private unmonitored meeting with Private Bradley Manning. Regrettably, to date

> the Government continues to refuse to allow the Special Rapporteur to conduct private, unmonitored, and privileged communications with Private Manning, in accordance with the working methods of his mandate (E/CN.4/2006/6 paras. 20-27).

Id.

208. In March 2012, Mr. Méndez, speaking at a U.N. Human Rights Council meeting in Geneva, condemned PFC Manning's treatment as "cruel, inhuman and degrading treatment," specifically citing "the excessive and prolonged isolation he was put in during the eight months he was in Quantico." He also rejected the justifications offered by government officials for what was done to Manning: "the explanation I was given for those eight months was not convincing for me." *Id.* It is hypocritical for the United States to admonish other countries for their lack of transparency in the treatment of prisoners, while refusing to allow the United Nations meaningful access to a pretrial detainee on U.S. soil.

209. By insisting that the visit be monitored,[25] Quantico officials could thwart the very purpose of the process: to allow PFC Manning to speak candidly about the conditions of his confinement without fear of reprisal. The Defense submits that the failure to allow PFC Manning to have access to Mr. Méndez for an unmonitored visit where PFC Manning could freely discuss the conditions of his confinement in the hopes of getting some type of reprieve from them *itself* amounts to unlawful pretrial punishment. Because everyone at the Quantico Brig was abiding by Col. Oltman's unlawful order to not remove PFC Manning from MAX or POI, there was nowhere for PFC Manning to go – other than outside the chain of command – to potentially get relief. The failure to permit PFC Manning an unmonitored visit with the U.N. Special Rapporteur on Torture was designed to cover up from public view the wrongs that were being perpetrated at Quantico. Not only were Quantico officials insistent on keeping PFC Manning in MAX and on POI for the duration of his pretrial confinement, they were also insistent on shutting him up about it by foreclosing the only remaining avenue of redress – an organization outside the U.S. government.

210. The Brig's failure to allow PFC Manning access to the United Nations Special Rapporteur on Torture, in clear violation of international norms, itself amounts to punishment and also permits the *per se* inference that PFC Manning was being punished in contravention of his Article 13 rights.

d) The Conditions of PFC Manning's Confinement Permit the *Per Se* Inference that PFC Manning was Punished in Violation of Article 13

211. The cumulative conditions under which PFC Manning was held are unduly onerous, degrading, and detrimental to PFC Manning's mental health. Even leaving aside any conceivable government justification for these restrictions, the severity of the conditions under which PFC Manning was held permit the *per se* inference that the conditions were meant to

[25] The Brig, through the Government in this case, advanced the most narrow and nonsensical reading of the Brig's visitation rules. See *infra*, Facts. Regardless, well-established norms of international law clearly take precedence over Quantico's poorly-drafted visitation policy.

punish PFC Manning. *See U.S. v. Harris*, 2007 WL 1702575, *2 ("When an arbitrary brig policy results in particularly egregious conditions of confinement, the court may infer that an accused has been subject to pretrial punishment").

212. Indeed, courts have found Article 13 violations in circumstances far less egregious than these. *See United States v. Scalarone*, 52 M.J. 539 (N-M. Ct. Crim. App. 1999)(finding illegal pretrial punishment where accused held in medium custody special quarters for 87 days; in these special quarters, the accused was segregated from other prisoners and housed in a smaller cell for 23 hours a day); *United States v. Fuson*, 54 M.J. 523, 526 (N-M. Ct. Crim. App. 2000)(finding illegal pretrial punishment where accused spent 32 days in special quarters; the conditions under which the accused was held included "a 6' x 9' cell with no windows and having to remain in his cell 24 hours per day except for chow and a one-hour recreation break Monday through Friday."); *United States v. Sterling,* 2009 WL 1936287 (A. F. Ct. Crim. App.)(finding unlawful pretrial punishment where accused was placed in administrative segregation for 75 days, confined to a single cell up to 23.5 hours a day). *See also Lock v. Jenkins,* 641 F.2d 488, 494 (7th Cir. 1981)(finding a due process violation where pretrial detainees spent at 22 hours daily in their cells); *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980)(finding a due process violation where pretrial detainees were locked in cells twenty-four hours per day, with release only three times weekly; these detainees, however, were not in solitary confinement); *Ramos v. Lamm,* 485 F. Supp. 122 (D. Colo. 1979)(district court finding conditions of confinement unconstitutional and ordering that no prisoner could be housed in less than 80 square feet for more than 20 hours per day.); *Lyons v. Powell*, 838 F.2d 28, 29 (1st Cir. 1988)("In view of the apparently small area of confinement, we are further troubled by the appellant's contention that he was confined to his cell for 22-23 hours per day for a 27-day period"); *Magluta v. Samples*, 375 F. 3d 1269, 1274 (11th Cir. 2004)(11th Circuit "readily concluded" that the plaintiff stated a claim for a substantive due process violation where "plaintiff was confined under extremely harsh conditions – in solitary confinement (under conditions unlike other pretrial detainees or even convicted prisoners), locked in an extremely small, closet-sized space, and with minimal contact with human beings for a prolonged time … "; in *Magluta*, unlike the situation here, the plaintiff was actually a flight risk, as evidenced by officials' investigation into four separate escape plots.).

213. Thus, the conditions that PFC Manning endured for nine months are not constitutionally permissible. The conditions were so draconian and so far removed from the outer boundaries of propriety that they permit the *per se* inference of punishment in violation of Article 13.

E. Dismissal of All Charges is the Only Appropriate Remedy in this Case

214. Although some form of confinement credit is the typical remedy in cases involving unlawful pretrial punishment, dismissal is available as a remedy in an appropriate case. The Defense submits that if dismissal is not warranted in this case, then *in what case* would dismissal ever be warranted? The Defense does not believe that there has ever been such an egregious case of unlawful pretrial punishment in Army history. This Court needs to send a message that an unlawful order to keep a pretrial detainee in the equivalent of solitary confinement for almost nine months cannot – and will not – be tolerated.

215. In the recently-decided case of *United States v. Zarbatany*, 70 M.J. 169, 175 (C.A.A.F. 2011), the Court of Appeals for the Armed Forces said, in no uncertain terms, that dismissal is a potential remedy for Article 13 violations:

> Our inquiry does not end there, however. As previously noted, R.C.M. 305(k) does not limit the availability of other remedies under Article 13, UCMJ. It is axiomatic, for example, that a court with appropriate jurisdiction may remedy an ongoing Article 13, UCMJ, violation through the writ of habeas corpus. No doubt, additional credit under R.C.M. 305(k) is a remedy for violations of Article 13, UCMJ. Indeed, it is a normative remedy and one that has been expressly endorsed in the rules. But this Court has never held that R.C.M. 305(k) is the exclusive remedy for Article 13, UCMJ, violations. To the contrary, our case law explicitly recognizes that certain circumstances may warrant other relief. In *Crawford,* for example, we said that "[w]here we find that maximum custody was arbitrary and unnecessary to ensure an accused's presence for trial, or unrelated to the security needs of the institution, we will consider appropriate credit *or other relief* to remedy this type of violation of Article 13, UCMJ." Prior case law has recognized that "other relief" for Article 13, UCMJ, violations may range from disapproval of a bad-conduct discharge, to complete dismissal of the charges, depending on the circumstances. It follows that if a court can dismiss a charge in response to violations of Article 13, UCMJ, as in *Nelson,* a court can do something less by setting aside a discharge.
>
> Therefore, we reiterate this Court's prior holdings, that although R.C.M. 305(k) is the principal remedy for Article 13, UCMJ, violations, courts must consider other relief for violations of Article 13, UCMJ, where the context warrants.

Id. (citations omitted). *See also United States v. Fulton*, 52 M.J. 767, 769 (A. F. Ct. Crim. App. 2000)("We conclude that where no other remedy is appropriate, a military judge may, in the interest of justice, dismiss charges because of unlawful pretrial punishment, which violates Article 13").

216. In *Zarbatany*, the Court of Appeals for the Armed Forced emphasized that relief under Article 13 must be "meaningful."

> This Court first addressed the question of whether meaningful relief is required for violations of Article 13, UCMJ, in *Nelson* .... In *Nelson,* the appellant pled guilty to various violations of the UCMJ, including unauthorized absence, violating a lawful general order, possession of marijuana, and breach of restriction, and was sentenced to a bad-conduct discharge, forfeiture of all pay and allowances, confinement at hard labor for six months, and reduction to E–1. The appellant was placed in pretrial confinement under circumstances indistinguishable from those of adjudged and sentenced inmates including

identical indoctrination, dress, living, eating, and labor requirements. This Court reversed the board of review, holding that the appellant's pretrial confinement conditions constituted pretrial punishment in violation of Article 13, UCMJ, and due process. The appellant having already served his sentence, the only unexecuted portion of the sentence was the punitive discharge. The appellant requested relief in the form of dismissal of the charges and specifications. Although the court recognized that the board of review was the proper authority for reassessing the appropriateness of the sentence, the Court nonetheless concluded that "modification of the sentence is in order." Specifically, the Court held:

> Under these circumstances, were we simply to return the case to the board of review for reassessment of the sentence, we would thereby imply that the bad-conduct discharge may be affirmed. Such a course would deprive the accused of all meaningful relief, and would rightly suggest that this Court is prepared to wink at such grossly illegal treatment of men in pretrial confinement. The disastrous effects of such a situation upon the system of military justice itself are so manifest as to require us to eliminate that possibility.

Since *Nelson,* this Court has sought to "ensure meaningful relief in all future cases" involving violations of Article 13, UCMJ. However, as in the context of appellate due process delay, the question of what relief is due to remedy a violation, if any, requires a contextual judgment, rather than the pro forma application of formulaic rules. Whether meaningful relief has been granted and should be granted will depend on factors such as the nature of the Article 13, UCMJ, violations, the harm suffered by the appellant, and whether the relief sought is disproportionate to the harm suffered or in light of the offenses for which the appellant was convicted.

In light of these cases, we conclude that meaningful relief for violations of Article 13, UCMJ, is required ...

Id. (citations omitted).

217. The Defense believes that simple "X-for-1" credit does not remedy the egregious punishment to which PFC Manning was subjected for almost nine months at Quantico and which sparked both domestic and international outrage. An award of pretrial sentencing credit would simply permit Brig officials, now and in the future, to punish soldiers with absolute impunity. From the Brig's perspective, if a soldier is facing a high enough sentence (e.g. life in prison) there is no reason *not to* subject the soldier to Article 13 punishment. In PFC Manning's case, assume that the Government could prove its case and that PFC Manning were to be sentenced to life in prison, without the possibility of parole. Assume further that PFC Manning was subjected

to 258 days of illegal pretrial punishment[26] for which he was awarded 3-for-1 credit (amounting to 774 days). Where would this leave him? In the exact same position that he would be in *without* the sentencing credit. In other words, as long as a solider is charged with very serious crimes, there is no disincentive for Brig officials to refrain from imposing punishment prior to adjudication.

218. One might argue that Brig officials will refrain from illegally punishing accuseds because they, themselves, might face consequences for subjecting soldiers to Article 13 punishment. The Defense is not aware of any case where confinement officials were called to task for imposing Article 13 punishment on a pretrial detainee. In fact, in *United States v. Anderson* 49 M.J. 575 (N-M. Ct. Crim. App. 1998), the Court learned of an unwritten Marine policy which *per se* amounted to unlawful pretrial punishment and, *in a footnote*, the court encouraged those involved "in the administration of Navy and Marine Corps brigs" to "ensure that decisions whether to place pretrial confines in a maximum-custody status are based on all relevant factors." *Id.* This footnote hardly screams outrage.

219. This is not the message that we want to send – either to those who punish soldiers unlawfully, or to those soldiers who are unlawfully punished. To allow the deplorable actions of those at Quantico (not to mention those who turned a blind eye to those actions) to go unchecked would make an absolute mockery of the constitutional protections which PFC Manning should be afforded. Article 13 provides that "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence." This is a codification of the constitutional protection that PFC Manning enjoys by virtue of the Fifth Amendment Due Process Clause. *Bell v. Wolfish,* 441 U.S. 520 (1979). The clause provides that a person shall not be "deprived of life, liberty, or property, without due process of law." The Due Process Clause does not provide that one can permissibly be deprived of such liberty, so long as a military judge tacks on some illusory credit when sentencing an accused. Confinement officials do not get to trammel on an accused's constitutional rights and "buy" their way out of it through judge-imposed sentencing credit. If the constitutional protection against pretrial punishment is to mean anything, then all charges again PFC Manning must be dismissed with prejudice.

220. In this case, PFC Manning personally and through his counsel complained for over eight months about the draconian conditions of PFC Manning's confinement. The Government in this case did nothing about it. In late November 2010, the Government contacted the Brig about the following:

> Defense has made a request that PFC Manning's status be reduced from POI to some other status where he is able to have more time outside or workout in his

[26] The Defense concedes that PFC Manning's initial classification in MAX and under Suicide Risk could have been legitimate based on information known by the Brig at the time. However, continuing to hold PFC Manning in Suicide Risk after 6 August 2010, in contravention of the mental health provider's recommendation, amounted to pretrial punishment.

> cell. My understanding is that his status determination is made based upon a list of factors including his charges, mental health and behavior. Since the Defense has made this request to lower his status it is something that we have to at least address. Is there a lesser level of POI that PFC Manning could be moved to. If the recommendation of the Brig personnel is to have him remain on POI that is fine, we just need to have it addressed to the Defense counsel.

See Attachment 35.

221. The Government's request shows that the Government could not care less whether PFC Manning was actually removed from POI status ("If the recommendation of the Brig personnel is to have him remain on POI that is fine"); it just wanted to protect itself against an Article 13 claim. This is further evidenced when the Government states:

> The defense counsel is concerned about PFC Manning's mental and physical health in relation to his small amount of time outside. In order to combat any potential Article 13 issues I would like to get a copy of the logs that show when PFC Manning went outside and how long he stayed there. I know that he usually gets 20 minutes daily but I need to have the logs to show that."

Id. Far from trying to remedy the situation and uphold PFC Manning's constitutional rights, the Government was simply looking for documentation that could be used to "combat any potential Article 13 issues." *Id.*

222. Not only did the Government not do anything about it, *nobody* did anything about it. The Staff Judge Advocate's Office did nothing about it; the Quantico confinement facility did nothing about it; CWO4 Averhart did nothing about it; CWO2 Barnes did nothing about it; Col. Oltman did nothing about it; Col. Choike did nothing about it. How an American soldier could be left to languish in solitary confinement for nine months is incomprehensible. This case has given American justice, and military justice in particular, a bad name.

223. In *United States v. Fulton*, 55 M.J. 88, 90-91 (C.A.A.F. 2001), Chief Justice Crawford stated:

> A court should not use its supervisory authority to impose extraordinary remedies to vindicate wrongs unless the person allegedly wronged has sought, and failed to obtain, reasonable, remedial relief through, *e.g.*, command channels, either directly or under Article 138, UCMJ, 10 USC § 938; the Inspector General's Office; or the Chaplaincy. If the command and staff offices have turned a blind eye toward an egregious situation, dismissal of court-martial changes would be warranted as an extraordinary measure.

The quote could not be more apt if spoken about the instant case. Here, PFC Manning had repeatedly sought remedial relief through every avenue available for a period of eight months.

Everyone involved "turned a blind eye toward an egregious situation." *Id.* This Court cannot also turn a blind eye toward this egregious situation. Accordingly, dismissal is available as an appropriate remedy; indeed, the Defense submits it is the only appropriate remedy. *See also United States v. Zarbatany*, 70 M.J. 169, 172 (C.A.A.F. 2011)(finding illegal pretrial punishment where "specific complaints ... should have put the commander on notice that [the accused] was being illegally punished [but] he didn't care because he thought the punishment was appropriate for the crimes he had done – overcoming the accused's presumption of innocence.").

224. To the extent that this Court does not believe that dismissal of all charges with prejudice is an appropriate remedy (which the Defense submits that it is), the Defense asks that this Court award at least 10-for-1 credit for the egregious Article 13 violations outlined above. In addition, the Defense requests that, depending on PFC Manning's forum selection, this Court also consider the illegal pretrial punishment in fashioning an appropriate sentence. In *United States v. Fulton*, 52 M.J. 767 (A. F. Ct. Crim. App. 2000), the military judge found that there had been 105 days of illegal pretrial punishment. He determined that he would "factor in [the illegal pretrial punishment] facts and determine an appropriate sentence" *and* he would order credit for the punishment endured.

225. That at least 10-for-1 credit is warranted is supported by *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011). In that case, the accused was in "virtual lockdown" status for a period of 119 days while in pretrial confinement. The accused was denied access to mental health counseling, despite repeated requests. The military judge ultimately awarded 4-for-1 credit, but noted that "the court is very tempted to provide ten-for-one credit solely on the mental health issue considering this installation's notice of the seriousness of the mental health issues." In *Zarbatany*, the 4-for-1 credit proved to be "meaningful relief" since the accused was only sentenced to confinement for six months (and thus, the confinement credit exceeded his sentence). *See United States v. Zarbatany*, 2012 WL 215865 (A. F. Ct. Crim. App.); *See also United States v. Tilghman*, 44 M.J. 493 (C.A.A.F. 1996)(awarding ten-for-one credit for illegal pretrial confinement in contravention of judge's order).

226. In the instant case, the Defense submits that, if this Court is not inclined to dismiss the charges, confinement credit of at least 10-for-1 must be applied against any potential sentence. PFC Manning was held in "virtual lockdown" for more than double the length of time of the accused in *Zarbatany*. Like in *Zarbatany*, the Brig repeatedly ignored serious mental health concerns – that continuing to hold PFC Manning in the equivalent of solitary confinement was detrimental to his mental health. The remedy in *Zarbatany* meant that the accused was immediately released from pretrial confinement upon his conviction. Likewise, any remedy crafted by the Court here must also provide meaningful relief – which the Defense submits would consist of considering the Article 13 issue in sentencing (if PFC Manning proceeds judge alone) and awarding at least 10-for-1 credit.

CONCLUSION

227. In light of the foregoing, the Defense requests this Court dismiss all charges with prejudice owing to the flagrant violation of PFC Manning's constitutional right to not be punished prior to trial. Should this Court determine that dismissal is not an appropriate remedy, the Defense requests meaningful relief in the form of at least 10-for-1 sentencing credit for the 258 days PFC Manning inappropriately spent in the equivalent of solitary confinement and, if PFC Manning elects to proceed judge-alone, consideration of the unlawful pretrial punishment issue in sentencing.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel